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# BUSINESS LAW

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# BUSINESS LAW

BY SAMUEL D. HIRSCHL, S. B., J. D.

## INTRODUCTION

LAW: ITS MEANING, SOURCES, AND CLASSIFICATION.

### Section 1. What is Law?

**§ 1. Varying uses of the word "law."** What is law? We speak of the laws of God, the moral law, the laws of nature, the laws of logic and esthetics, the laws of political economy, and the like, as well as the laws of Illinois and New York. These examples suggest only a few of the varied meanings of the word "law."

**§ 2. Law as a rule of human conduct enforced by the state.** When we consider the statement, "A master is liable for the acts of his servants within the scope of the authority given them," we use the word "law" applied to it, in quite a different sense from its use in any of the foregoing examples. A law, in the true legal sense, is a rule of human conduct that will be enforced by the state through its public tribunals or officers. Its obligations bind human beings only, and its sanction proceeds from politically organized human society.

### Section 2. Sources of Law.

**§ 3. Custom.** It is generally agreed that the earliest source of law was custom. Long before there was anything corresponding to a political organization that enforced rules of human conduct there were family and group customs, originating in utility or religion or accident, that were normally followed under the sanction of divine command, public opinion, or family authority. Today custom constitutes but a very small part of the law of any of the more progressive nations. As a source of law it has

been almost wholly displaced by adjudication and by legislation, which are described below.

§ 4. **Adjudication as a source of law.** The early decisions of courts are based upon custom, or, that failing, upon the justice of the particular case. Subsequent similar cases naturally tend to be decided the same way, and a judicial habit of following precedents is likely to become established and finally to become obligatory. This has been the history of the common law for six or seven hundred years. The common law judges have professed to decide cases according to precedents where clear ones properly applicable could be found. Even decisions upon customs, being ordinarily more precise and definite than the custom, come to establish the law for later cases instead of an appeal being made to the original custom. Where no exact precedent exists, analogous ones will be followed; and so precedents are extended, modified, and applied to new situations until a question rarely arises for which there are not at least some strongly analogous precedents. The court thus reflects, conservatively, the social ideas of its time, tempered by those of the immediate past, and really makes law by its decisions, which become precedents for the future.

Law created by custom or adjudication is often called unwritten law, as distinguished from law created by legislation, which is called statutory or written law.

§ 5. **Legislation as a source of law.** Popular custom and judicial precedent necessarily operate slowly and irregularly in making and changing law. In every organized state there exists some power deliberately to change the law for the future by legislative decree. The method and organ of legislation may vary from the edict of a czar to the vote of a town meeting.

Most of the fundamental private relations between men have not been much affected by legislation. The great subjects of contracts, torts, agency, domestic relations, and the older crimes have in the main developed without legislative interference. The property rights of married women, the law of real property, corporations, procedure, and the relation of master and servant are the principal branches of private law that have been substantially changed by statute; and in all of these the innovating

legislation was compelled by fundamental changes in social ideals and organization. In recent years there has been much legislation designed to secure adequate public control of private acts and business, but not much effecting substantial changes in the law of private rights between individuals.

**§ 6. Classification of law.** The field of law is ordinarily divided by teachers and writers into forty or fifty subjects, each consisting of a group of closely related topics treated separately from other groups more from practical than from theoretical considerations, though there is usually some fundamental coherence between the topics in each group. Thus, the general subject of contracts will be treated as one subject, and certain specialized kinds of contracts such as sales, negotiable instruments, insurance, and the like will be treated as other separate subjects.

**§ 7. The common law.** The term "common law" is used in legal writings with a variety of meanings, usually apparent from the context. 1. In its widest sense the term is used to contrast the entire system of English or Anglo-American law with other great systems, usually the Roman or civil law. In this sense it includes not merely all unwritten law, but such statutes as have been generally enacted in jurisdictions where it prevails and are so interwoven with the general principles of the unwritten law as to form a unified whole. 2. In a narrower sense it is used to distinguish the rules of unwritten law applied in England by courts of law (or of common law), from those applied there by courts of equity, courts of admiralty, the ecclesiastical courts, and so forth. In this sense it also ordinarily includes the older statutes that have become deeply imbedded in the system, particularly those affecting property rights. Where, as commonly in America, and now in England, the same courts apply the rules both of law and of equity, this usage of the term refers to those rules that would be applied by courts of law, if the former division still existed. 3. In its narrowest sense it excludes from its meaning even those ancient statutes referred to under 2, above.

In all three of the above senses, the common law is in force in all American states, except Louisiana, which has been under the civil law since the days of its French and Spanish settle-

ment. The common law of any one of our states is somewhat different from the common law of England, due to the operation of two causes: (a) Part of the English common law not suited to the conditions of this country was not applied by our courts; (b) local customs and adjudications here, after the settlement of this country, have departed somewhat from those of England since then. For the same reason the common law rules of no two of our states are exactly alike; and, in addition, the states are not agreed upon the date at which the English common law and existing statutes applicable to the colonies are to be accepted as a starting point for American variations from them. The dates most commonly fixed for this purpose are May 13, 1607 (first permanent settlement of Virginia), and July 4, 1776 (Declaration of Independence).

### Section 3. Courts of Equity.

§ 8. **The term "equity"** is used to describe another branch of law distinguished both from the common law and from legislative enactments. The rules of equity were administered in England, where they grew up during the latter part of the Middle Ages, by courts of chancery existing side by side with the common law courts.

§ 9. **Function of equity.** Equity not only recognized and enforced useful rights unknown to the common law, but it supplemented the remedial deficiencies of the older system in many ways indispensable to the needs of modern society. The common law had almost no preventive power; it could only redress injuries after they had occurred. Equity restrained threatened wrongs by issuing injunctions, and parties were thus enabled to have their rights determined in advance of the infliction of actual injury. In most instances the common law did not give a plaintiff what he had bargained for, but only money damages. It did not order the defendant to discharge any duty he owed the plaintiff, but it merely gave such reparation as could be gained from the seizure of the defendant's property. Equity ordered the defendant to perform his obligation in many cases where paying for the breach of it would not amount to performance The common law could not deal with more than two sets of parties in a

single litigation. Cases of the inter-related rights of several persons, as in cases of suretyship, partnership, and bankruptcy, could not be adequately handled in a common law court. A critically situated business could not be nursed along by a receivership at common law. No judgment could be given, conditional upon the performance of future acts by other parties. A common law judgment was either absolutely given or denied. In all of these respects equity afforded flexible remedies and a procedure that adapted itself to the demands of business and of justice. When the two systems were finally fused in England, in the latter part of the nineteenth century, the consolidating statute provided that wherever the rules of law and of equity applicable to a case differed, the equity rule should be administered by the court. In most American states the two systems of law and equity are administered by the same courts and judges, but their separate doctrines are preserved in a manner that has an important effect upon both the form and substance of judicial relief.

**§ 10. Difference between legal and equitable rights.** The foregoing explanation is believed to be necessary in order that subsequent paragraphs in this work, using the terms "legal rights," "equitable rights," and similar expressions, may be properly understood. Although in most of our jurisdictions law and equity are administered in the same courts, it will be found that a person's rights often differ greatly, according to whether he has a so-called legal right or an equitable right. For example, a grantee receiving a valid deed to land from one who has a good title is said to obtain a "legal title," whereas if he had obtained merely a contract of purchase he would have had an "equitable title." Although the latter expression means merely that he has a right to proceed against the owner and compel him to give a deed, for many purposes he is treated as the actual owner of the land. But since he is not actually the owner of the land, his right may be lost by the delivery of a valid deed to a subsequent bona fide purchaser who pays full value for the land and takes without notice of the prior purchaser's rights. In such case there would be two purchasers, each having a claim the land, but one having a legal title and the other merely to

equitable title, and the rights of the former would prevail, whether the parties should contest their rights in a court of law, a court of equity, or a court administering both law and equity. In other words, although the technical distinctions which often govern the various kinds of procedure in the courts may not be important here, the difference between a legal right and an equitable right should never be lost sight of, and is further explained in the chapters following.

# CHAPTER 1.

## CONTRACTS.

### Section 1. Classification of Contracts.

**§ 1. Contract defined.** A contract in the modern sense has been defined as an agreement containing a promise enforceable in law.[1]

**§ 2. Contracts and quasi contracts.** A distinction must be drawn between true agreements, the result of voluntary and intentional assent to an obligation, and obligations which the law imposes where one man has profited at the expense of another under circumstances that in justice call for a readjustment of rights. This latter class is known as quasi contracts. The promise assumed is a mere fiction, designed to give the injured party the benefit of the common law action for the enforcement of contracts. The only point of resemblance to a true contract is this common remedy.

Where the contract is written or expressed in terms at the time of making, it is known as an express contract.

When it is necessary to consider the statements made, and the conduct of the parties as well, in determining their obligation, the contract is said to be implied in fact.

**§ 3. Executed or executory contracts.** Before the parties have completed performance under a contract, it is known as an executory contract; when performance is complete, it is known as an executed contract. Where one party has performed on

[1] Langdell, Summary of Contracts, Sec. 183.

his part, the contract is of course executed as to him, but executory as to the other party.

**§ 4. Bilateral and unilateral contracts.** "A bilateral contract is one which is to be performed on each side at some future time."[1] Thus A promises to sell a watch to B for $50, and B promises to pay $50 therefor. The contract is executory on both sides. "A unilateral contract is one in which one of the parties performs at the moment when the other promises to perform."[1] Thus, if B promises to pay A $50 if A will deliver a watch to B, and A delivers the watch, A obtains the promise of B to pay $50 in return for the watch. The contract is executed as to A and executory as to B. Insurance policies, debts, and promissory notes are examples of unilateral contracts.

## Section 2. Offer and Acceptance.

**§ 5. Promise must be enforceable in law.** It will be observed from the definition that a contract is not only an agreement containing a promise, but it must be one that is enforceable in law. Many agreements which contain promises are of no validity in law for the reason that they are not intended by the parties to create legal obligations. Ordinarily, social agreements are of this nature. Thus, if A invites a friend to dinner, and he accepts, we have an agreement in proper form, but the failure to attend the dinner or a failure to give the dinner involves no legal consequence.

**§ 6. Motive is not material.** The motives which induce parties to make a contract are as a rule not material as long as they intend to make a binding agreement. Parties enter into contracts for a variety of reasons, and the law is not concerned with the motive, but considers only the question whether or not an offer has been made and accepted.

**§ 7. Meeting of minds.** In order that there may be an agreement, it is necessary that the minds of both parties shall coincide with respect to every material term of the alleged agreement. If one party has in mind one thing as the subject matter of a contract, and the other party has in mind a different thing, it will be impossible to say that they are in agreement. Thus, in

[1] Wald's Pollock Contracts (Williston's ed.), 7.

the case of Raffles v. Wichelhaus,[2] the agreement was to buy and sell a cargo of cotton to arrive by the ship "Peerless" from Bombay. It appeared that there were two vessels named "Peerless," one sailing in October and one in December, and the plaintiff had one vessel in mind, and the defendant, the other. The court accordingly held that the parties had never agreed on the same thing and there was no contract.

Again the parties may fail to agree by reason of the fraud or deceit practiced upon one of the parties by the other party, so that one party signed an entirely different agreement, or did an entirely different act from the one he intended. In Foster v. MacKinnon[3] A signed an instrument represented by B to be a guaranty similar to papers he had signed on previous occasions. As a matter of fact the instrument signed was a bill of exchange. The jury found that A was not negligent. It was held that A was not liable, since he could truthfully say that he had never agreed to become liable on a bill of exchange. If, however, A had been negligent in signing, that is, if he had signed the instrument without investigation as to its character, and it had afterwards come into the hands of a person who had purchased it in good faith, the defendant would have been liable, not because of a contract, since there would have been none, but because his negligence had made possible the loss to the present holder.

The same rule is illustrated in cases where a party intends to make a particular contract, but thinks he is dealing with a person other than the one with whom he contracts. The courts hold in these cases that a valid contract exists provided he deals face to face with the party. Thus, A comes to B and states that he is C, a man of established credit, when in fact he is not. B, relying on the statement, sells goods to A on credit, which A sells to D, who buys in good faith. B can not recover the goods from D, because he did intend to sell to the very person with whom he made the agreement, although he was induced to sell to him by reason of the belief that the person was C. He, therefore, is not in a position to say as in the preceding case that he

[2] 2 Hurl. & Colt. 906.
[3] L. R. 4 C. P. 704.

did not make the contract, since he did intend to sell to A.[4] If, on the other hand, A had *written* to B making exactly the same representation that he was C, and B had sent the goods addressed to C, which A came into possession of, B could recover the goods since he never intended to make a contract with A, and never had A in mind when he made the agreement or when he shipped the goods.[5]

Where one party had previously dealt with another as the agent of a third person, and an agreement is now entered into between the parties in which no representation is made that the party is acting as agent although the other party assumes that he is so acting, nevertheless a contract will arise, if it is clear that the person who was thought to be acting as agent did not know of the delusion under which the other party was laboring and consequently did not purposely mislead him.[6]

**§ 8. When a knowledge of terms of offer is presumed.** A person accepting an offer is charged with knowledge of the terms of the offer, and can not set up his ignorance of them if reasonable means were adopted by the offeror to bring them to his attention. This principle is illustrated by the case of Fonseca v. Cunard Steamship Company.[7] A passenger bought a ticket which contained on its face terms limiting the liability of the carrier for the baggage of the passenger. It appeared that the passenger did not read the conditions, yet the court held he must be assumed to have known them since they were printed in full on the face of the ticket, and he could not set up that he had not read the terms of what amounted to an offer.

**§ 9. Actual meeting of minds not required.** All these cases serve to show that, while the law is generally stated in the form that there must be an actual meeting of minds of the parties to make a contract, the term is not to be taken in its strict literal sense. Since in the case just stated it is apparent that the minds of the parties did not actually meet, yet as the offeror had made his offer in definite terms, and had taken reasonable steps to

[4] Edmunds v. Merchants' Despatch Transportation Co., 135 Mass. 283.
[5] Cundy v. Lindsay, L. R. 3 App. Cas. 459.
[6] Stoddard v. Ham, 129 Mass. 383.
[7] 153 Mass. 553.

bring them to the attention of the offeree, the law presumes that the offeree when he accepted the offer, accepted on these terms.

**§ 10. Where the contract arises.** It is sometimes important to determine where the contract arises since the construction of its terms will ordinarily depend upon the law of the state where the contract arose. If parties are dealing face to face when the agreement is made the place where they are at the time will be the place of contract. If, however, the contract is made by letters or by telegraph or telephone, a different situation arises. Suppose for example, A in New York writes to B in Chicago offering to sell certain goods at certain prices, and B on receipt of the letter writes a letter accepting the offer, when does the contract arise, and where does it arise? According to the established rule in such cases the contract arises as soon as the letter is put into the mail in Chicago, properly addressed and stamped. Accordingly the contract is completed in Illinois.[8]

When an offer is sent to one at a distance, the offeror impliedly authorizes the offeree to use the ordinary means of communication, and if the offeree deposits a letter or sends a telegram properly addressed, he has completed the act which the offeror recognizes as an acceptance and if the telegram[9] or letter is not received, the risk[10] falls on the offeror and not on the offeree. In the case of contracts made by telephone, the same rule applies as in the case of letters or telegrams, and accordingly the contract arises at the place where the acceptance of the offer is spoken into the transmitter.

**§ 11. Acceptance must be communicated.** The acceptance of an offer must be communicated to the offeror. As just indicated, the acceptance is communicated in point of law as soon as the offeree has done the act indicated by the offeror as constituting an acceptance. A mere determination to accept an offer is not enough. Thus, if a person to whom an offer has been made writes a letter of acceptance which he carries in his pocket or leaves on his desk, no contract arises. He must do the overt act contemplated by the offeror, and put his acceptance out of his possession and in the course of transmission to the offeror.

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[8] Dunlop v. Higgins, 1 H. L. Cas. 381.

[9] Bank of Yolo v. Sperry Flour Co., 141 Cal. 314.

[10] The risk referred to in this paragraph is the loss of the letter and not the loss of the subject matter of the contract.

**§ 12. Mere silence not an acceptance.** Mere silence on the part of the offeree ordinarily will not constitute an acceptance. Thus if A writes to B: "I have shipped to you certain goods at certain prices, and unless I hear from you shortly, I will assume you have accepted them on these terms," B is not bound to notify A that he will not take the goods and he can not be compelled to accept them or pay for them. Of course, if he does take and use the goods, it would constitute an acceptance of the offer, and would render him liable.[10] There are exceptions to the above rule growing out of prior dealings of the parties.

**§ 13. When actual receipt of acceptance is necessary.** The general rule, that a contract made by mail or telegraph arises as soon as the acceptance is put in course of transmission, is based upon usage and the supposed intent of the parties, and therefore evidence will be received to show that in a particular case the parties intended a different rule to apply. Thus if the offeror stipulates that the acceptance must be received by him, the contract will not arise when the letter is mailed, but only when it has actually been received as stipulated.

Again the circumstances under which the offer is made may show that an actual receipt of the acceptance was intended.

**§ 14. Acceptance must be responsive to the offer.** The acceptance of an offer must be responsive to the offer. Thus if A writes to B, "I will give you $500, if you will agree to build a fence around my property," and B replies, "I accept," a contract is made. But if B instead of replying starts to build or actually builds a fence, it would not be an acceptance since the offer calls for a reply and not an act. If, on the other hand, A had said, "I will give you $500 on your completing a fence around my property," no contract would arise by B's writing a letter accepting the offer, since A is asking not for a promise, but for an act, i. e., building a fence.

**§ 15. Notice of acceptance: Unilateral contracts.** Where the acceptance of an offer is an act, notice that the act has been done is not necessary, since the contract arises as soon as the act is completed.[11] Thus in the illustration above the contract

[10] Bruce v. Pearson, 3 Johnson (N. Y.) 534.

[11] First National Bank v. Watkins, 154 Mass. 385.

would arise as soon as the fence was built. To this rule there are some apparent exceptions growing out of commercial usage. Thus where A wrote to B, "If you will sell certain goods to C, I will guarantee that he will pay for them," this offer would be accepted by selling the goods to C in reliance on the guaranty, but the law requires further that B notify A that he has acted on the offer. The giving of the notice is not an acceptance of the offer, however, but it is an additional act which the law requiries in deference to commercial usage. If A is to be responsible for C's debt to B, he should be notified that the debt has been incurred in reliance on his promise in order that he may protect himself. In any case, he can of course stipulate that notice be given him, which would ordinarily be the safer thing to do.

**§ 16. Certainty of terms: Advertisements as offers.** Not all proposals made in the form of offers are to be so regarded. Their meaning depends on the circumstances under which and the purpose for which they are made, and also the general understanding of business custom. Ordinary advertising matter furnishes the common illustration. A merchant advertises his wares in a newspaper setting out the articles to be sold and the prices. The advertisement will not be construed as a specific offer, but merely as an attempt to call attention to the wares of the merchant and to show the bargains he is offering, but he is not bound to sell the articles thus advertised to applicants although they tender the price. Circular letters sent out to the trade by a wholesale merchant fall within the same rule.

**§ 17. When advertisement is an offer.** It must not be presumed from the foregoing that it is impossible to make an offer by advertisement or circulars. It is possible, provided it is clear that the author intends the circular or advertisement to be an offer. Thus in Carlill v. Carbolic Smoke Ball Co.,[12] the company advertised that they would pay £100 reward to any one who used their smoke ball for three times daily for two weeks, and contracted the prevailing influenza. A purchased a ball and used it as directed for that period, contracted influenza, and then brought an action to recover the reward. It was held a valid contract.

[12] L. R. 1 Q. B. (1893) 256.

The court distinguished the case from the ordinary advertisement by saying that the Smoke Ball Company evidently intended it to be an offer because they expressly stated that they had deposited £100 in a certain bank as evidence of their sincerity in the matter, which statement would justify the belief on the part of the plaintiff that this was not an ordinary advertisement.

**§ 18. Binding force of agreement preliminary to formal contract.** Where the parties have made a preliminary agreement with the intention that a formal contract shall be drawn up, and it appears that the parties have agreed upon all the essential terms of the contract, and nothing remains to be done except to embody those terms in a formal contract, the general rule is that a party can not withdraw.[13] Even where the contract is evidently incomplete, if the parties proceed to treat it as binding, and perform under it they will be held to the bargain which results from their acts, rather than their words.[14]

**§ 19. Revocation of the offer.** An offer may be withdrawn at any time prior to its acceptance. A revocation to be effective must be actually communicated to the offeree. A mere decision on the part of the offeror to revoke, or even a letter or telegram of revocation, duly posted, will not be effective until received, and if the offeree accepts the offer by duly posted letter or telegram,[15] or by doing any other act which the offeror designates as an acceptance, a contract will arise even though the revocation is received by the offeree before the offeror has received the acceptance. Thus, in the case of Byrne & Co. v. Van Tienhoven,[16] A offered to sell B a quantity of tinplate on October 1st. On the 8th of October A wrote to B revoking the offer. On the 15th of October B cabled an acceptance. It was held that a contract arose the moment the cablegram was filed for transmission, although the letter of revocation had been mailed a number of days before. yet as it had not yet come to the attention of B, it was ineffective as a revocation.

**§ 20. Options.** The only effect of a promise to keep an offer

[13] Shepard v. Carpenter, 54 Minn. 153.
[14] Cases above. Clark, Contracts, 62.
[15] See § 10 above.
[16] L. R. 5 C. P. D. 344.

open is to determine how long the offer will remain open if not previously revoked. If, however, the offeree gives something of value for the promise to keep the offer open, a contract arises, and a revocation of the offer will constitute a breach, rendering the offeror liable in damages. Agreements of this character are known as options.

§ 21. **Revocation of offers to public.** Where the offer is made to the public generally, as in the case of rewards, it would be impossible to give personal notice of withdrawal to every one who had knowledge of the offer. Accordingly, it has been held that such an offer may be withdrawn in the same public way in which it is made. Thus, in Shuey v. United States,[17] it was held that offers of reward made by the United States government for the apprehension of the assassins of President Lincoln could be withdrawn by publication in the same manner that the original offer was made, and consequently a person who performed an action in reliance upon the offer after such publication could not recover.

§ 22. **Termination by lapse of time.** Where an offer is not limited in terms to a fixed time, it will not continue indefinitely. In such cases the offer is said to lapse on the expiration of a reasonable time. What is a reasonable time is a question dependent on the facts of each case. The court will take into consideration the occasion of the offer, the subject matter, and the language used by the parties in determining this question. For example, if an offer concerns goods which rapidly fluctuate in value, ordinarily a shorter time will be implied than in the case of goods more stable in value. And an offer by telegraph would ordinarily require more prompt reply than one sent by mail.

§ 23. **Answer by return mail.** Frequently the offer stipulates for an answer by return mail. Such stipulation is usually considered not to mean the first mail that goes out after the offer is received. A letter posted on the day the offer is received complies with this rule. It may well appear in certain cases that the term "by return mail" is used in a mere formal way and is not intended to be literally complied with.

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[17] 92 U. S. 73.

§ 24. **Effect of death.** The death of the offeror before the offer is accepted revokes the offer. The offer is said to be terminated by operation of law and no notice to the offeree is essential as in the ordinary case of revocation.

§ 25. **Effect of insanity.** The same rule generally prevails in the case of insanity of the offeror.

In the United States the majority of the courts hold that if the offer has been accepted and performance has been completed to the point where the parties can not be put back in their original position, assuming that the parties have acted in good faith, ignorant of the insanity, the contract will stand.[18]

## Section 3. Consideration.

§ 26. **Consideration.** The law requires that every enforceable promise, except promises under seal (which will be dealt with hereafter), should be supported by a consideration. By consideration is meant something of value received or given at the request of the promisor in reliance upon and in return for his promise. The option contracts referred to (§ 20 above) will serve as an illustration of the application of this rule. Thus, if A offers to sell B a piece of land for a fixed sum of money, and B asks for time to consider the offer, and A promises, he may have it; nevertheless A may dispose of the land to others, since his promise to B is a mere naked promise unsupported by any consideration. If, however, B pays a sum of money to A in return for his promise to keep the offer open for a fixed period, a contract arises which is supported by a consideration and A can not then afterwards withdraw his offer. The money paid by B is known in law as a consideration.

A consideration must be a detriment to the promisee. Whether or not the promisor has derived any benefit from act of the promisee is immaterial, but if it appears that the promisee has given up something of value in reliance on the offer, he can succeed in his action to establish a contract; otherwise not.

§ 27. **Motive and consideration.** A distinction must be drawn between motive and consideration. There may be a great variety

[18] Anson, Contracts (Huffcut's 2 ed.), 154, note.

of reasons which induce parties to enter into an agreement. Those reasons ordinarily would have no bearing on the validity of the agreement itself. The consideration for a contract differs from the motive in that the latter is the cause for entering into the agreement, whereas a consideration is the thing given by the promisee in reliance on the promise. This distinction is illustrated by the case of Thomas v. Thomas,[1] in which A's husband, desiring that further provisions be made for A, on his death bed requested B, who was the executor of his estate, to make conveyance to A of the use of a certain dwelling house. In furtherance of this request B agreed that A should have the house and A promised to pay £1 per year rent. B refused to carry out the agreement and plaintiff brought the action for breach of contract and recovered, the court holding that while the motive back of the entire transaction was to carry out the last wish of the husband, yet that would not sustain the undertaking, but the £1 a year which A was to pay was a sufficient consideration to support the promise.

§ 28. **Benefit of the promisor.** The conclusion that a benefit to the promisor is immaterial is illustrated by numerous cases. The act refrained from or done may be an actual benefit to the promisee, yet if it is something he had a legal right to do or not to do, giving up this right is a consideration. In Talbott v. Stemmons,[2] A promised to pay B $500 if he would not use tobacco during the life of A. B abstained and was allowed to recover on the ground that as he had a right to use tobacco, refraining from doing so would constitute a consideration.

§ 29. **Composition with creditors.** Some cases present an apparent exception to the rule that all contracts must be supported by a consideration. Thus, where a debtor makes an agreement with his creditors whereby the creditors agree to accept fifty cents on the dollar in return for the debtor's promise to pay that amount, it would seem that inasmuch as the creditors are entitled to one hundred cents on the dollar, their promise to accept one-half the amount could not operate as a consideration. Such compromises are, however, usually sustained by the courts,

[1] 2 Q. B. 851.
[2] 89 Ky. 222.

either on the theory that the consideration consists in the undertaking of the debtor to secure the consent of all other creditors to the surrender, or that the creditors mutually agree with each other for the benefit of the debtor.[3] Settlements under the bankruptcy act, whereby the debtor is discharged, do not come within the rule, as his discharge is not based upon contract, but upon an express provision of the law.

**§ 30. Performing or promising to perform a contract obligation.** Doing what one is already bound to do is not a good consideration. Thus, in the leading case of Foakes v. Beer,[4] A had obtained a judgment against B, and an agreement was made by which B promised to pay the judgment in installments and A agreed to accept the same. After all the installments were paid, A sued B for the interest which had accrued on the judgment and it was held that he could recover, since B by the terms of the judgment was bound to pay interest and his agreement to pay the judgment was a mere promise to do something he was already bound to do and there could be no consideration for A's agreement to release the claim.

If, however, the agreement is that the debtor shall pay at a different place or pay in a different manner, this will constitute a detriment and support a promise on the part of the other party to accept the act in satisfaction. In the case of Jaffray v. Davis,[5] A gave his notes for $3,462 to B, which were accepted in complete satisfaction of a debt of $7,714 due to B. It was held that B could not afterwards sue for the debt since A had given his note which he was not bound to do, and which, therefore, would constitute a consideration. The same rule is applied in the case of employment. Thus, in Stilk v. Myrick,[6] A shipped for a voyage as a seaman. Owing to the desertion of some of the crew the vessel was shorthanded and the master promised to pay additional wages to the remaining seamen, if they would work the vessel home. It was held that this promise of additional wages was without consideration, since it was the duty of A under his

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[3] Anson, Contracts (Huffcut's 2 ed.), 120, note.
[4] L. R. 9 App. Cas. 605.
[5] 124 N. Y. 164.
[6] 2 Camp. 317.

original contract to assist in working the vessel home. He is, therefore, doing merely what he is already bound to do. If the acts to be done by the seaman under the second agreement had been in addition to those prescribed under his original contract he could recover. In Turner v. Owen,[7] the vessel proved unseaworthy, and the crew agreed to remain on the vessel in consideration of additional wages and it was held they could recover, since it was not their duty under the contract to remain with an unseaworthy vessel.

**§ 31. Performance of a non-contract obligation.** On the same principle, the doing or promising to do an act which a person is already bound to do by law, or the refraining from doing of something which a person has no legal right to do can not constitute a consideration, since it can not be a legal detriment. Thus, where an offer of a reward is made for the apprehension of a criminal and an officer whose duty it is to apprehend criminals makes the arrest, he can not claim the reward, since he has merely done what he is already bound to do, and will not be permitted to say he has performed his duty on reliance upon a particular offer.[8]

If, however, the act done in reliance upon the offer is one which the performer was not bound to do as the result of his official duty, a good contract will arise. Thus in Harris v. More,[9] the court held that an officer who had gone outside of his jurisdiction for the purpose of collecting evidence, could recover the reward offered for such evidence, since it was not his duty to procure it.

**§ 32. Past consideration.** It has already been shown that in order that an act be a consideration for a promise or a promise for a promise, that they must be given in exchange for each other and in reliance upon each other. Therefore, if the act which is relied upon as a consideration was done before any promise was made it will not support a subsequent promise. In Roscoria v. Thomas,[10] A contracted to sell a horse to B. Later B refused

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[7] 3 F. & F. 176.
[8] Gillmore v. Lewis, 12 Oh. St. 281.
[9] 70 Cal. 502.
[10] 3 Q. B. R. 234.

to take it unless A warranted that the horse was not over five years old, and also that it was not vicious. A gave his promise to this effect and B sued him for breach of it. It was held he could not recover since there was no consideration to support the promise. The purchase price which B agreed to pay could not be a consideration for this new promise, since it was given for A's promise to sell the horse, and before the promise sued upon was made.

**§ 33. Same: Apparent exceptions to the rule.** Certain cases at first sight appear contrary to this rule. In Hatch v. Purcell,[11] an action was brought by A, who had been an inmate of B's household for many years and had assisted in the work of the house and the management of the household affairs. Afterwards B requested A to bring in a bill for services. This request was taken by the court as evidence that A's position in the household was that of a servant and not of a mere dependent, and therefore that she might have recovered irrespective of the express promise. Where a person, as a son or daughter, continues to reside at home after reaching legal age, the presumption is that such services as may be rendered are gratuitous, and no recovery can be had in the absence of an affirmative agreement.

There are many cases where A has performed services for B at the latter's request, where B has, after the service has been completed, promised to pay a fixed sum. In such cases the promise to pay a fixed sum is received as evidence of the value of the services.

**§ 34. Moral consideration.** The fact that A has rendered services for B which morally would entitle him to recover will not be enough to sustain an action. If A rescues B from drowning, there is perhaps a moral obligation for B to pay a reward, particularly if A sustained loss as a result of his act, but B would not be liable although he afterwards promised to pay a fixed sum. In Mills v. Wyman,[12] the adult son of A became ill while penniless and among strangers, and was nursed by B. A was not legally liable for services rendered to his adult child. A afterwards promised B to pay him the value of his services.

[11] 1 Foster (N. H.) 544.
[12] 3 Pick. 207.

It was held he could not recover since B had not undertaken the care of the son in reliance upon any promise of A. In such a case there is every moral reason why A should compensate B for his services, but no recovery can be had in law.

§ 35. **Same: Apparent exceptions to the rule.** Certain cases are frequently cited to sustain the proposition that a moral consideration will support a promise, but on examination it appears that they really do not sustain this rule, and are not exceptions to the general proposition.

Where a person under a legal obligation to pay a sum of money is discharged by act of law, as where A indebted to B goes into bankruptcy and is discharged from his obligation as a result of such proceedings, if he afterwards promises B to pay the amount, B can recover; not on the ground, however, that the moral obligation to pay the debt honestly incurred will constitute a consideration, but on the theory that the discharge in bankruptcy is merely a defense which the law has given to the debtor and which he may use or not at his pleasure. Accordingly if he agrees not to use it, it constitutes a waiver which prevents him from setting up the discharge.[13]

The same rule applies in the case of debts which are barred by the statute of limitations. Thus, if A owes B a sum of money which has been due for the period of time provided by the statute of limitations, and B sues A to collect, A can set up the statute as a defense. Like the discharge in bankruptcy most courts regard the statute of limitations as a defense which may be used or not at the pleasure of the debtor. Accordingly, if he acknowledges the debt, it will operate as a waiver of such a defense.[14] In many jurisdictions by virtue of statutes, a waiver of the statute can be made only in writing signed by the debtor.

§ 36. **Original obligation void.** If by reason of the legal incapacity of a party, as in the case of married women at common law, a contract is absolutely void, a subsequent promise to pay after the disability has been removed will not give rise to an obligation, since the subsequent promise can only be regarded as a waiver of a defense to a contract which otherwise was perfectly

[13] Dusenbury v. Hoyt, 53 N. Y. 521.

[14] Kent v. Rand, 64 N. H. 45; Ilsley v. Jewett, 3 Met. 439.

valid. In some jurisdictions, however, the rule as to contracts of married women has been modified, so that such contracts may be regarded as merely unenforceable while the marriage subsists, but otherwise valid. The same rule would be applied as in the case of the waiver of the statute of limitations, or of defense in bankruptcy.[15]

### Section 4. Contracts Under Seal. Parties.

**§ 37. Definition.** A contract under seal, or specialty, is an undertaking in writing formally solemnized by the seal of the party.[1] It was the common form for important undertakings in the earlier period of the law, but the growing tendency to disregard forms, coupled with legislation, has modified the law of sealed instruments profoundly, and assimilated them in many respects to ordinary simple contracts. Various obligations are specialties at common law; thus covenants, deeds, bonds, are forms of specialties, since they required a seal to give them validity. The term deed, synonymous with specialty, is now confined in ordinary meaning to sealed and unsealed conveyances of real estate.

The names of the parties must appear in the instrument. See Chapter XIII, §§ 13 and 26.

**§ 38. Delivery. Escrow.** Merely sealing does not give the instrument binding force. It must be delivered to the party, for whose benefit it is made.

Delivery to one not a party to the instrument, to be delivered by him to the party entitled on the happening of a stipulated event, is termed delivery in escrow, and the specialty does not become effective until the happening of the condition and the delivery to the party entitled.[2] If the specialty is delivered to the party *entitled,* although upon condition, the condition is void, and the specialty is in full force. If, however, the transaction is not one requiring a seal, a conditional delivery to the one en-

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[15] Goulding v. Davidson, 26 N. Y. 604.

[1] Bishop, Contracts, Sec. 110.

[2] Gilbert v. North American Ins. Co., 23 Wend. 43.

titled is valid, as the transaction stands on the footing of a simple contract.[3]

The specialty must be completely filled out before sealing and delivery, and subsequent additions invalidate the instrument, unless there be a subsequent re-execution or a new delivery.[4]

§ 39. **Disabilities limiting contractual capacity.** Two classes of natural persons are limited in their capacity to make contracts: 1. Those lacking mental capacity, as lunatics; 2. those possessing mental capacity but lacking legal capacity, as infants or minors and married women. Legislation has greatly modified the doctrines of the law as applied to married women. A third class of limited contractual capacity consists of artificial persons created by law, such as corporations.

§ 40. **Insane persons and idiots.** Insane persons and idiots are said to be liable on their contracts for necessaries. Their liability is not on the express promise, but on an implied one for the fair value of the goods furnished or services rendered. In this respect the liability is the same as that of infants.

§ 41. **Drunkards.** Persons so far under the influence of liquor as to be unable to realize their acts are in the same condition temporarily as insane persons, and the same general rules apply. They are liable for necessaries furnished in any event, and other contracts are treated as voidable at their election.

§ 42. **Infants.** All persons under 21 years old are infants or minors at common law. Statutes frequently fix the age at 18 in the case of women. In general an infant's contracts are not enforceable against him, except for necessaries. He may affirm or avoid them when he comes of age.

§ 43. **Married women.** Statutes in most of the states have substantially removed the common law disabilities of married women to contract, and allow them to contract as freely as other persons.

§ 44. **Corporations.** The subject is fully discussed in the chapter on Private Corporations, Chapter XIV, §§ 16-20.

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[3] Ordinary v. Thatcher, 41 N. J. L. 403; Blewitt v. Boorum, 142 N. Y. 357

[4] Powell v. Duff, 3 Camp. 181; Hudson v. Revett, 5 Bing. 368

## Section 5. Statute of Frauds.

**§ 45. Policy of the statute.** The law requires that certain classes of contracts shall be proven by a certain kind of evidence, in order to be enforceable in a court of law.

The purpose of such a rule is not to create a class of formal contracts, but to protect persons engaged in business transactions against perjury and false swearing. This rule of law had its origin in the statute, 29 Charles II (1677), chap. 3, sec. 4 and sec. 17, known as the statute of frauds. Most of this statute has been enacted with slight modifications in every American jurisdiction. It does not prescribe a form for legal agreements, but merely the kind of evidence that the court will receive to prove such agreements. If the agreement has been fully carried out, no question of its validity can be raised.[1] It is only when the alleged agreement comes before the court for enforcement that the statute becomes important. A contract may be perfectly good and yet not enforceable, because the proper kind of evidence is lacking.[2] Whenever this evidence is obtained relief can be had on the contract. Thus if A makes with B an oral contract that is within the statute, he can not sue B on it unless he can prove it by a memorandum, signed by B, showing the terms of the contract; but if he secures a memorandum or letter made at a later time in which B acknowledges the obligation, A can recover, since he now has the sort of evidence required.

**§ 46. Provisions of the statute.** The parts of the statute generally adopted in the United States are as follows: "Sec IV. No action shall be brought, (1) whereby to charge any executor or administrator upon any special promise to answer for damages out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; (3) or to charge any person upon any agreement made in consideration of marriage; (4) or upon any contract or sale of land, tenements, or hereditaments, or any interest in or concerning them; (5) or upon any agreement that is not to be performed within the space of one year from the

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[1] Stone v. Dennison, 13 Pick. 1.

[2] Wald's Pollock Contracts (Williston's ed.), 748.

making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

"Sec. XVII. Be it further enacted . . . that no contract for the sale of any goods, wares and merchandises for the price of £10 sterling or upwards [amount varies in American statutes] shall be allowed to be good except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment; or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized."

In several states this latter section is not in force.

**§ 47. Special promise by executor or administrator to pay out of his own estate.** An executor or administrator is not personally liable upon claims against the estate. His duty is to administer the funds that come to him as executor, and to pay debts and legacies as far as possible out of the assets. If he promises to pay a claim against the estate, it will not bind him personally, unless he clearly indicates that his promise is personal. Even then it is not binding unless the promisee has given a consideration, and the agreement is evidenced by a writing signed by him or his agent, as required by the statute of frauds. The promise must be to pay a claim made against the estate. In Bellows v. Sowles,[3] the executor of B's estate promised to pay C, an heir of B, a sum of money if he would not contest the will. This promise was not to pay a claim against the estate, or in settlement of one, but merely to protect the private interests of A. Hence the statute does not apply.

**§ 48. Promise to answer for the debt, default, or miscarriage of another.** This provision of the statute is discussed in Chapter XII, § 2.

**§ 49. Agreements in consideration of marriage.** This clause does not apply to mutual promises to marry but to promises to make a settlement of property or to pay money in consideration

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[3] 57 Vt. 164.

of marriage. Thus a promise by a man to settle certain property upon or pay a sum of money to a woman in return for her promise to marry or for actual marriage is within the statute.

§ 50. **Contracts for the sale of land, tenements, etc.** "This clause applies to all contracts affecting in any way the title to any kind of interest in any kind of real property, except leases, which are governed by other sections of the statute."[4] Thus, a contract by A to sell the standing trees on his land, is a sale of an interest in land. If, however, the title to the trees is not to pass to the purchaser until after they are severed from the land, as where A is to cut the trees and B is to take them as felled, the contract is for the sale of personal property. See Sales, Chapter V, §§ 10-23.

Courts of equity have permitted certain acts in connection with oral contracts for land to take the place of a writing. Taking possession of land and paying for it, for instance, will enable one to obtain a deed for it under an oral contract.

§ 51. **Agreements not to be performed within the space of a year.** Such contracts must also be put into writing.

§ 52. **The memorandum.** Where the contract is within the statute, it must be evidenced by a note or memorandum signed by the party to be charged therewith or his duly authorized agent. The term used, note or memorandum, indicates that a formal written agreement is not essential. The purpose of the statute is to protect the promisor against false claims and therefore any writing which discloses the terms of the agreement, the parties thereto, and is signed by the person against whom the suit is brought is sufficient. What constitutes a sufficient memorandum is discussed in Chapter V, §§ 21-23. See also Agency, Chapter II, § 22.

§ 53. **In general.** The foregoing should be sufficient to suggest the importance of putting all contracts into writing, whether it is clear that they fall within the terms of the statute of frauds, or not, as the validity of an unwritten contract is sometimes established only after costly litigation. An additional reason is, of course, the danger of an oral contract being defeated

[4] Harriman, Contracts (2 ed.), Sec. 58a.

through the inability of the parties to agree on its terms; or through the death of one of them, the absence of witnesses, etc.

### Section 6. Joint and Several Contracts.

**§ 54. Joint or several liability.** Any number of persons may be parties to an agreement. Where more than two are parties, their rights under it either as promisors or promisees will be determined by the construction of the instrument. The parties may intend a joint liability or right, or a several liability. Usually the language of the instrument will disclose the kind of obligation intended. Thus a note beginning "We promise to pay," signed by A, B & C would be a joint obligation. If it begins, "I promise to pay" and is signed as before, it would be joint and several.[1] Where the language of the obligation is not clear, the court will consider the nature of the agreement, and who received the consideration; if all received it, the contract is joint. Where two or more are parties to a promise, the presumption is that it is joint, although this presumption may be rebutted. The rule of construction has been modified by statute in many states, so that the presumption is the other way, i. e., that an obligation is joint and several, unless affirmatively shown to be joint. In many states, the statutes declare joint obligations to be joint and several.

**§ 55. Joint contracts.** In a joint contract the obligation is entire. Thus where A, B & C are jointly liable to X, there is but one cause of action against A, B & C. They are really conceived of as forming a distinct group or entity apart from the individual members of the group.

If X releases A, the result is that B & C are also released, since there is but one obligation.[2] X can release A from the obligation in another way, however. He may promise A for a consideration not to sue him. This will not destroy the obligation, and X can sue all the parties, but, when his judgment is obtained, he must refrain from satisfying it by seizing A's goods. The courts are disposed to treat releases, if possible, as promises not to sue, thus

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[1] Barnett v. Juday, 38 Ind. 86; Hemmenway v. Stone, 7 Mass. 58.

[2] Osborn v. Martha's Vineyard Ry. Co., 140 Mass. 549.

saving the creditors' rights against the other parties.[3] By statute in many states, a release of one will not release the others.

§ 56. **Survivorship.** Another incident of joint obligations and rights is survivorship. Thus if A and B are jointly liable to X, and A dies, X's only right at law is against the survivor B. If B then dies, X's right would be against B's executor.[4] The doctrine of survivorship has generally been modified by statute, so that the estates of deceased joint obligors are bound.

§ 57. **Joint and several obligations.** With respect to joint and several obligations, the law of survivorship does not apply, and the estate of the deceased debtor will be liable. The relief against the estate must be had in a separate proceeding, as by filing a claim against the estate; the executor of the deceased can not be joined as a party to a suit with the surviving obligors,[5] since the two claims are not of the same nature.

### Section 7. Rights and Liabilities of Third Persons.

§ 58. **General doctrine. Lawrence v. Fox.** A person who is not a party to an agreement may have rights under it, if the agreement was made for the benefit of that person. The third party may sue on the agreement whenever it appears that the contract was made for his benefit. In Lawrence v. Fox,[1] A loaned a sum of money to B, in consideration of which B agreed to pay the same amount on a future day to C, a creditor of A. C was allowed to recover on the contract on the theory that the contract was made for his benefit.

A common example of such cases is that where A mortgages his property to B and afterwards sells the mortgaged premises to C who, as part of the purchase price, agrees to assume the mortgage. B is generally permitted to sue on this undertaking.[2]

§ 59. **Mere incidental benefit insufficient.** It must be clear that the object of the parties was to benefit the third person

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[3] Owen v. Homan, 4 H. L. Cas. 997, 1037.
[4] Richards v. Heather, 1 Barn. & Ald. 29.
[5] May v. Hanson, 6 Cal. 643.
[1] 20 N. Y. 268.
[2] Bay v. Williams, 112 Ill. 91.

directly. A mere incidental benefit will not entitle him to recover. Thus in Davis v. Clinton Water Works,[3] the water works company entered into a contract with the city of Clinton, by the terms of which they agreed to supply water to the city for public purposes including the extinguishment of fires, for certain compensation to be paid by the city. A was a resident of Clinton and his house was destroyed by fire, the loss being occasioned by the failure of the water works company to supply the water as agreed in the contract. It was held that he could not recover since the contract was obviously not made for his benefit. The city was under no duty to supply water and the contract on the terms indicated could not be regarded as for the benefit of any citizen. A different result might be reached, however, if it appeared that the city was under duty to perform the act in question and had taken a bond to secure the performance.

**§ 60. Defences to suit by third party.** When a third party sues upon the contract, any defense which the promisor might have used against the promisee at the time the contract arose may be used against the beneficiary. Thus where A obtains a promise from B to pay a sum of money to C, if B's promise was induced by the fraud of A, that fact can be set up as a defense by B when action is brought against him by C.[4]

**§ 61. Assignment of contracts.** Under some classes of contracts the benefits may be assigned, and such transfers are ordinarily known as equitable assignments, because they first originated as a doctrine of the equity courts; but the term equitable assignment has no particular significance today, since the courts of law will enforce them as readily as the courts of equity.

The substantial right obtained by the assignee as a result of the assignment is a power of attorney, which enables him to take advantage of such rights and such only as the assignor enjoyed under the contract.

**§ 62. What claims are assignable.** Mere money demands may be assigned without question. Thus where A is indebted to B for a sum of money, B may assign the claim to C. Where the claim sought to be assigned involves further duties on the part

[3] 54 Ia. 59.

[4] Wald's Pollock, Contracts (Williston's ed.), 271.

of the assignor, as for example where A has agreed to sell goods to B and B has agreed to pay a certain sum therefor at a future day, if B assigns his claim to C, he cannot transfer to C, without the consent of A, the liability as well as the benefits of the contract. The assignor still remains liable to carry out promises on his part. If the contract involves personal skill—thus if A agrees to pay B a sum of money in return for which B agrees to paint A's carriage—B could not assign this contract, since it is presumed A dealt with B on account of his skill as a painter, and the services of any other painter, however skilful he might be, could not take B's place.[1]

§ 63. **Same: Personal service.** Contracts for personal services, whether involving personal skill or not, are non-assignable. Contracts of this character do not survive the death of either party and, being personal in their nature, are regarded as non-assignable.

§ 64. **Same: Future interests.** Where the right which is assigned has not yet arisen, but will arise in the process of time or by operation of law, it may be assigned. A mere expectancy, however, can not be assigned. For example, if A is employed by B, he may assign his wages to be earned in the future to a third person; but if he merely expects to secure employment with B, no contract of employment yet having been made when he assigned the right to his wages to C, C obtains nothing from such an assignment. A had no right to make the assignment, as it was but a mere expectancy.[2]

§ 65. **Same: Contracts non-assignable in terms.** A contract may also be made non-assignable as a result of the agreement of the parties. Thus, if A and B in contracting for the sale and purchase of goods, stipulate in terms that the contract is not assignable, any transfer of the rights under the agreement without the consent of all parties concerned would be inoperative.

§ 66. **Same: Public policy.** Many claims are not assignable for reasons of public policy. Thus pensions, salaries of public officials, mere rights of action for personal injuries, etc., are not assignable, since to permit such assignments would tend to in-

[1] Robson v. Drummond, 2 Barn. & Ad. 303.

[2] O'Keefe v. Allen, 20 R. I. 414.

jure the public service, or defeat the purpose for which the grant was made, as in the case of the assignment of a pension.

§ 67. **Requisites of a valid assignment.** The law does not prescribe any precise form in which assignments must be made. It is essential that the assignor shall clearly express his intention to confer upon the assignee the authority to collect the particular obligation.[3] Where the claim assigned is in writing, the surrender of the writing to the assignee would be the usual method.

§ 68. **Notice to the debtor.** It is essential in order to protect the rights of the assignee against third persons that notice of the assignment be given to the debtor, since the original obligation still stands, and if the debtor in good faith pays the claim to the original creditor without notice of the assignment, he will be discharged.[4] If, however, he has been notified of the assignment, he can not escape liability to the assignee by payment to the assignor.[5]

§ 69. **Successive assignments.** The courts are not agreed regarding successive assignments. Thus, if A is indebted to B, and B assigns his claim to C and later assigns the same claim to D, a majority of courts would hold that the assignee first giving notice to the debtor would be entitled.[6] On the other hand there are many decisions to the effect that the order in time of the assignments determines the rights of the parties. Thus C, who received the first assignment, would have a better right than D, whose assignment was later in time. It would seem, however, that their rights should be determined by the intermediate steps taken by the assignees. Thus if A assigned a claim against B to C and afterwards assigned the same claim to D, if D before taking the assignment inquired of B whether or not a prior assignment had been made and B, not having been notified of the transfer to C, assures him in the negative, D ought to prevail over C, since the latter's failure to notify the debtor has misled D to his injury; otherwise, if D took the assignment without inquiry.

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[3] Risley v. Phenix Bank, 83 N. Y. 318.
[4] Heermans v. Ellsworth, 64 N. W. 159.
[5] Littlefield v. Storey, 3 Johns, 425.
[6] Wald's Pollock, Contracts (Williston's ed.), 281, note.

**§ 70. Partial assignments.** Where A holds a claim against B for $500 and is indebted to C for $200, it is not possible for A to assign to C $200 of the claim against B.

But if the debtor is notified of the partial assignment and consents to it, the majority of courts permit the assignee to recover in an appropriate action.[7] If he does not consent to it, nevertheless he will be held liable to the assignee if he pays the whole amount of the claim to the original creditor with notice of the partial assignment. While he is not bound to pay a partial assignment, he is bound to retain in his hands the amount represented by the partial assignment when he settles with the original creditor. A failure to do so will render him liable.[8]

**§ 71. Negotiable contracts.** Third parties acquire rights under contracts in various other ways that are analogous to assignment; for example, in the case of negotiable paper where the holder of the paper transfers it to another, the party acquires a right which is determined by the law governing negotiable instruments, and differs materially from the rights of the assignee. See Chapter XI, §§ 1-5.

**§ 72. Rights of the assignee.** Since the assignee merely obtains the rights which his assignor has in the claim assigned, it follows that any defence which the debtor could have urged when sued by the creditor, he can likewise urge against the creditor's assignee. Thus the fact that the creditor was guilty of fraud in connection with the contract, or has been paid in whole or in part, may be set up by the debtor.[9] The defence of set-off must arise before notice of the assignment, however, or it will not be available.[10] To pay the original creditor after notice of the assignment would be a fraud on the assignee. So also to acquire any claims against the creditor with a view to setting them off against the original debt, will be ineffective if done with knowledge of the assignee's rights.[11] By virtue of the contract of assignment, the creditor agrees not to interfere with the assignee

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[7] James v. Newton, 142 Mass. 366.
[8] Bispham, Equity (6 ed.), Sec. 166.
[9] Miller v. Kreiter, 76 Pa. St. 78.
[10] Heermans v. Ellsworth, 64 N. Y. 159.
[11] Welch v. Mandeville, 1 Wheat. 233.

in the collection of the claim; hence accepting payment from the debtor after assignment will be a breach of contract, even though the debtor himself may be released as a result of a payment made in ignorance of the assignment.

### Section 8. Interpretation and Construction of Contracts.

**§ 73. Rules of interpretation.** Where parties to a contract are unable to agree as to the precise scope of the obligation, or are unable or unwilling for any reason to carry it out, the courts are usually called upon to determine the question for them.

In performing their function the courts make use of certain rules to aid in arriving at the goal of their investigation, i. e., the ascertainment of the intent of the parties. These rules are not hard and fast and yield to the obvious contrary intent of the parties themselves. The statement that the court will carry out the intention of the parties must be qualified by the further statement that it will carry out not necessarily the actual intent or expectation of the individual parties, but the intent properly construed. Thus it may happen that the liability enforced is not the one the parties intended to assume, but if expressed in clear terms, the court is bound to give it the ordinary meaning.

**§ 74. Oral contracts.** Where the agreement sued upon is by word of mouth only, or partly written and partly oral, the court will receive in evidence all the facts known to the parties, the acts and words of the parties, and the agreement will be the final construction which the court puts on these acts and words.

**§ 75. Written contracts.** Where the agreement sued upon is in writing, another rule comes into play. Where the writing is executed in a formal way, and is drawn as a result of previous negotiation, it will be assumed to embody the will of the parties, and the court will not consider the acts or words of the parties prior to its execution that may be inconsistent therewith, since the final will of the parties is assumed to be embodied in the instrument.

**§ 76. Parol evidence rule.** Evidence will not be received to add to or take from an agreement which the court finds to be complete. To do so would place every contract at the mercy of unscrupulous witnesses.

In the case of written contracts, particularly, the court must rely mainly upon the language of the parties themselves, and will assume, where the parties use plain, unequivocal language having an accepted meaning, that the parties intended it in its ordinary and accepted sense.

§ 77. **Dependent or independent promises.** A makes a contract with B, by the terms of which A agrees to sell a horse to B, and B agrees to pay $500 therefor. B is unwilling or unable or hesitates to carry out his agreement. A desires to proceed against him for breach of contract.

The courts would say that since A gave his promise to deliver a horse to B in return for B's promise to pay $500, it will be assumed that A intended to give the horse only in the event that he received the money and conversely that B intended to pay the money only in the event that he received the horse. There being no reason on the facts of the case why both acts can not be done at the same time, and it appearing further that no provision is made for the extension of credit, they must be performed at the same time. Accordingly A could recover on B's promise by offering to perform, and without tendering or handing over his property to B. Hence, we have the rule of law that where mutual promises can be performed at the same time, they must be performed at the same time.

§ 78. **Time for performance.** Since the parties have not agreed upon any specific time for performance, it will be assumed that performance within a reasonable time is intended. The court must decide whether A offered to perform within a reasonable time after the contract was made. What is a reasonable time depends on the circumstances of each case, hence we have the rule of law that where no time is mentioned in the contract, it must be performed within a reasonable time.

§ 79. **Test of mutual dependency.** Promises that are given in exchange for each other are presumably dependent.

§ 80. **Contracts conditional on satisfaction.** As a general rule express stipulations of the parties can not be disregarded. Thus A makes a contract with B to paint B's portrait. B promises to pay A $1,000 if the picture is satisfactory. A can not recover the money until he has presented a picture that satisfies B.

The fact that B is unusually critical is immaterial, since A agreed to take the risk of B's approval.

If A can show that B is acting fraudulently in withholding approval, it would be possible to recover, since fraud would waive the condition. The mere fact that the picture was well painted and in the opinion of others was a good likeness would not show bad faith.[1] In all cases where personal taste is involved, it is extremely difficult to show bad faith. Where personal taste is not involved so directly, as in a building contract which contains the common provision that no payments are to be made except on certificate of architect, the fact that the building was erected in a workmanlike manner according to specifications will be evidence that the architect was acting in bad faith in withholding the certificate.[2]

**§ 81. Notice of facts upon which performance depends.** When a performance on the part of one of the parties to the contract depends upon the happening of a certain event within the peculiar knowledge of the other party, it is the duty of the latter to disclose that fact; otherwise he can not hold the promisor liable. Thus in Hayden v. Bradley [3] A rented property from B, and B covenanted to keep the premises in repair. It was held A could not sue B for failure to keep the premises in repair, unless he had first notified him that the premises were out of repair, and given B an opportunity to perform his promise. Where the fact on which the promisor's liability depends is not within the peculiar knowledge of the other party to the agreement, but is equally accessible to the promisor, he is bound to ascertain that fact.

**§ 82. Installment contracts.** Some difficulties have arisen as to the proper interpretation of installment contracts. Thus B makes a contract with A to purchase 1,000 tons of iron to be delivered at the rate of 200 tons a month until the entire amount is delivered, each installment to be paid for on delivery. Suppose for some reason A fails to deliver the first installment. Can B thereupon refuse to receive any future installments, and set up

[1] Brown v. Foster 113 Mass. 136.
[2] Chism v. Schipper, 51 N. J. L. 1.
[3] 6 Gray 425.

A's failure to deliver the installment as a defense in a suit upon the entire contract? If the evidence shows that a failure to receive the installment has practically defeated the ends which the purchaser had in view in making the contract, or was accompanied by conduct on the part of A which indicated to B that A did not intend to perform the agreement, the failure to deliver ought to constitute a good defense. If on the other hand, such does not appear to be the case, the plaintiff ought to be allowed to recover subject to any set-off which the purchaser may have as a result of not receiving the particular installment.

In Bettini v. Gye, A agreed to sing at B's theater, in opera, and also in concerts. He agreed to be present for rehearsals at least two weeks before the opening of the concert season, but owing to illness, he was unable to appear until the time fixed for the beginning of his contract. B set this up as a breach which justified him in putting an end to the contract. The court held, however, that it appeared that A was to begin his engagements by singing in opera. It was, therefore, unnecessary for him to appear for rehearsals, and the breach was not one going to the substance of the contract. On the other hand, in the case of Poussard v. Spiers, A employed under a contract to sing in opera only, was unable to appear at the opening night of the opera season. Accordingly B put an end to the contract. It was held he was justified in doing so, since it was evident that the failure of a leading singer to appear at the opening night of the opera was a breach which would go to the very substance of a contract, and would justify B in putting an end to it, and making arrangements with other parties.

### Section 9. Discharge of Contracts

§ 83. **Rescission by mutual agreement.** After parties have made a contract, if for any reason they desire to terminate their obligations, they may do so by mutual release, or rescission.[1] In a case of this sort the parties give up their respective rights under the original contract. The new agreement must contain the essentials of a binding contract. The necessary considera-

[1] Collyer & Co. v. Moulton, 9 R. I. 90.

tion is found in the mutual giving up of rights under an old contract. It is not enough that B says he will give up all claims against A, since this would amount to a mere offer. To be effective as a rescission A must likewise surrender his rights under the contract.[2] The original contract need not be rescinded in terms; if the parties enter into a further contract, which is wholly or partially inconsistent with the original, the latter is rescinded by implication.

**§ 84. Dependent relative rescission.** If the new contract is invalid for any reason, the question arises: Does the old contract remain in force? It is possible for the new agreement to operate as a rescission if the parties so intend it, and it will so operate if it expressly rescinds it; but it will not rescind it by implication, since the courts will assume that the parties intended to make a contract, and intended that, if the new agreement is ineffective, the original one shall stand.[3]

**§ 85. Rescission for a default under the contract.** Where one of the parties to a contract has substantially failed or refused to perform within the time stipulated, the party not in default may treat the contract as at an end, save for his right of action on the defaulting party's promise; thus if A contracts to build a house for B and fails to proceed, B may elect to treat the contract as ended and may also sue A on his promise.

**§ 86. Release.** The right of action can be released by an instrument given upon good consideration. A form of release is given on the next page.

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[2] King v. Gillett, 7 M. & W. 55.

[3] Noble v. Ward, L. R. 2 Exch. 135.

GENERAL RELEASE.

KNOW ALL MEN BY THESE PRESENTS, that *I William Smith*.....
.....
.....
.....
.....
.....of *Chicago*.....
in the County of *Cook* and State of *Illinois* for and in consideration of the sum of *One Hundred Dollars ($100.00)* lawful money of the United States of America, to *me* in hand paid by *John Kenyon*,.....
.....
.....
..... .....
*have* remised, released, and forever discharged, and, by these Presents, *do*, for *myself* and *my* heirs, executors, and administrators, remise, release, and forever discharge the said *John Kenyon*, *his* heirs, executors, and administrators, *from any and all liability arising out of a certain contract for construction work entered into between the said William Smith and the said John Kenyon and bearing date the fourth day of October, 1937*, of and from all manner of actions, cause, and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims and demands, whatsoever, in law or in equity, which *I* now have against *him*, ever had, or which *my* heirs, executors, or administrators, hereafter can, shall, or may have, for, upon, or by reason of any matter, cause, or thing, whatsoever, from the beginning of the world, to the day of the date of these Presents.

IN WITNESS WHEREOF, *I* have hereunto set *my* hand and seal, the *fifth* day of *April* in the year of our Lord one thousand nine hundred *thirty-eight*.

*(Signed) William Smith* [SEAL]

Sealed and Delivered in the Presence of
*(Signed) Clarence Smith*
*(Signed) John Jones*

**§ 87. Accord and satisfaction: Unilateral.** If A is indebted to B for $500 which is due and B promises to release the debt if A will deliver to B a horse, B may nevertheless sue upon the original debt before the horse is delivered, and may even refuse

the horse if tendered, the reason being that B's promise is a mere offer which may be withdrawn at any time before acceptance by A.[4]

§ 88. **Same: Bilateral.** If in the above case the parties mutually promise to deliver the horse and release the debt, B can still sue A for the $500, and the new contract will not be admitted as a defense. Since the parties have not agreed that the new contract shall take the place of the old obligation,[5] the court will not allow the new agreement to be set up, since if received it would be in law a complete bar to any further action on the original contract,[6] and if A did not deliver the horse, B's only remedy would be for breach of promise to deliver, while he only intended to forego his rights under the old agreement in case the new promise was carried out. Hence, we have the general rule that the new agreement technically known as an accord, can not be set up as a defense to an action on the original contract. Yet if the new agreement is carried out, we have an accord and satisfaction which is a good defence to a suit on the original debt. The accord, however, is itself a perfectly good contract, and when violated by the suit on the original contract may be sued upon by A.

§ 89. **Conditional satisfaction.** Where the debtor gives his note for a debt due, it is not presumed that the original obligation is discharged. While it is evident that the creditor is willing to forgive the old promise if the new promise is performed, it will not be assumed that he is willing to rely on the new promise exclusively. Accordingly when the new obligation becomes due, and is not paid, the creditor may sue either on the new promise or the original one at his election. The above is the rule in the absence of a clear intent of the parties to put an end to the old transaction.

§ 90. **Accord and satisfaction by implication.** Accord and satisfaction may be inferred from the conduct of parties where there is no express agreement. Thus, A has a claim against B which is unliquidated. He makes a demand for $50 which he

[4] Kromer v. Heim, 75 N. Y. 574.
[5] Morehouse v. 2nd Nat'l Bank, 98 N. Y. 503.
[6] Ford v. Beech, 11 Q. B. 852.

conceives to be the amount due. B sends his check for $25 stating that it is to be accepted as payment in full. A retains the check and perhaps notifies B that he will apply the same on account and hold B for the balance claimed. If A sues B for the balance, the majority of American courts hold this to be a good accord and satisfaction, the retention of the check being regarded as an acceptance of the terms on which it was sent.[7]

**§ 91. Novation: Definition.** Subsisting obligations under a contract may be destroyed by the substitution of new parties for one or both of the former parties to the original obligation. This method of rescission is known in law as a novation.

**§ 92. Substitution of parties.** A substitution of parties is accomplished by the erection of a series of new agreements by the terms of which one of the original parties is released, and in consideration thereof, the new party assumes the obligation. To be valid all the parties to the new and old contracts must be parties to the new agreement. Thus, if A owes B and it is desired to substitute C in A's stead, the parties meet together and in consideration that B release A, C promises to assume the debt. As a result B's claim against A is wiped out, and a new contract on the same terms arises between C and B. It is not essential that A be an actual party to this arrangement, but it seems necessary that C be authorized by A to enter into the contract and to act as his agent, since it would be officious for a stranger to step in and pay A's debt to B and consequently not binding.

The most difficult question in the cases is one of fact to determine whether or not the creditor really intended to release the debtor.[8] The question is commonly presented in this form. A is a creditor of the firm of B and C. It is agreed between B and C that C shall retire from the business and as part of the consideration for his interest, B agrees to assume the debts of the firm and A is notified of this arrangement and assents to it. It would seem that this would not constitute a novation unless A agreed in terms to release C from liability on the firm's debts, and that an intent to give up legal rights should not be assumed merely because of a general assent by the creditor to

[7] Nassoiy v. Tomlinson, 148 N. Y. 326.
[8] Cochrane v. Green, 9 C. B. (N. S.) 448

the arrangement. On the other hand, of course, the creditor should be careful about giving his assent to an agreement which may turn out disadvantageous to him.

In order that a novation shall be valid, it is essential that the original obligation shall be an enforceable one; otherwise the surrender of it will not constitute a consideration.[9]

**§ 93. Substitution of creditors.** Where A has a claim against B, which is to be turned into a claim of C against B, it is necessary that two steps be taken: first, A must assign his claim against B to C, and then C must enter into a contract with B by which, in consideration of A's release of the assigned claim, B promises to pay C. The consideration is the giving up of the assigned claim.

## Section 10. Illegality.

**§ 94. Illegal contracts.** Any agreement which has for its purpose the violation of the law, or which will indirectly result in such violation or in the invasion of some established rule of public policy, is illegal, and is treated in law as void. It is not necessary that the illegality be criminal, that is, punishable by the state. It is enough that it violates private rights or a public policy not yet enforced by criminal laws. The fact that the parties to the agreement are innocent of wrongful intent is immaterial, in general, if it is clear that the promises when carried out will result in an illegal act. The law will not presume that the parties intend an illegal act. Its illegality must be shown by clear affirmative evidence. If the contract can be performed in two ways, one legal and the other illegal, the law presumes, in the absence of proof to the contrary, that the legal method was intended and will be adopted.

**§ 95. Gaming contracts.** Wagers or bets are illegal and void in most jurisdictions, and consequently any contract which has for its object the furtherance of a wager is illegal. The agreement must be so closely connected with the thing forbidden as to make the contractor a party to it.

**§ 96. Commercial wagers.** A makes a contract through a

[9] Scott v. Atchison, 36 Tex. 76

broker for the purchase of barley for future delivery. When the time comes for delivery no grain is delivered, but the difference between the price agreed and the market price is paid to the vendor. If the original contract was made with no intention of making a delivery, the contract would amount to a wager as to the future price of barley and would be illegal, but if delivery was in good faith intended when the contract was made, then a subsequent settlement of differences would not make the contract illegal.[1]

§ 97. **Agreements in restraint of trade.** It has long been a settled principle of common law that contracts in unreasonable restraint of trade are illegal and void, since it is against the interest of the state to permit its citizens by contract to bind themselves not to exercise skill in their chosen calling.

§ 98. **Valid restraints: Trade secrets.** On the other hand restrictive agreements of a certain character have long been recognized as valid. Thus the manufacturer of a medicine may have a secret formula for preparing it. It is vital to his business that the secret be protected and the law will aid him in preserving it by enjoining his employes from disclosing it or using it in a rival business.[2]

§ 99. **Same: Good will.** Frequently one of the important elements of value in an established business is its good will, which may be defined as the probability that persons who have previously patronized the business will continue to do so. It is recognized as a property right and will be protected. Any contract that has for its purpose the protection of the good will of a business, and is reasonably designed for that purpose will be enforced. In Bishop v. Palmer,[3] A was engaged in the manufacture of cotton waste and bed quilts. He sold the business to B and agreed not to engage again in this business. It was held that the contract was illegal being in unreasonable restraint of trade. Such a sweeping restriction was unnecessary to protect the good will of the business. The earlier decisions laid down the rule that covenants of this character, unlimited in time or

[1] Pixley v. Boynton, 79 Ill. 351
[2] Fowle v. Park, 131 U. S. 88
[3] 146 Mass. 469

space, were illegal. To comply with this rule a sweeping covenant was framed by which the promisor agreed never to engage in the same business except in a designated territory. Thus in Diamond Match Co. v. Roeber,[4] A agreed not to manufacture matches except in Nevada, and the covenant was sustained under the above rule. The later decisions disregard this test as artificial and hold that the validity of the covenant must be determined by the scope of the business which has been sold. Thus where the business sold is purely local to a city or town or even a part of a large city, a covenant not to engage in the same business within an area much larger than necessary to protect the business will be void. In Herreshoff v. Boutineau[5] the court applied this test and held that an agreement by a language teacher not to teach for one year in the state of Rhode Island was illegal, since it was much broader than necessery to protect the interest in question. On the other hand, if the business is international in its scope, a covenant of similar scope to protect the good will will be sustained. In Nordenfelt v. Maxim-Nordenfelt Gun Co.[6] the court sustained a sweeping clause of this character on the ground of the unlimited scope of the business sold.

§ 100. **Statutory prohibitions.** Agreements are frequently entered into by dealers in a given commodity, the object of which is to advance prices by curtailing production or limiting competition. In practically every state today statutes exist which prohibit agreements of this character and pronounce them void. The national government has a sweeping statute of the same character commonly known as the Sherman anti-trust act,[7] providing that every contract or combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations is illegal.

§ 101. **Rule in the absence of statute.** In the absence of statutes of the above character, contracts designed to raise prices or curtail the production of a commodity were invalid if the subject matter was an article of prime necessity, such as flour,

[4] 106 N. Y. 473.
[5] 17 R. I. 3.
[6] L. R. (1894) App. Cas. 535.
[7] 26 U. S. Stat. 209.

bread, provisions, or fuel, but binding if not involving such articles.[8] The later cases, however, as a rule ignore this distinction and regard contracts of this character illegal merely because of their restrictive purpose. In More v. Bennett[9] an association formed for the regulation of rates to be charged by stenographers was held invalid, although it did not violate any statutory provision.

**§ 102. Agreements tending to defeat the administration of justice: Stifling prosecution.** It is the duty of a citizen to aid in the enforcement of law; consequently any contract which has for its purpose the stifling of criminal prosecution is illegal. Thus if A is charged with theft from B, an agreement whereby B agrees not to appear against A in consideration of money paid by A or on his account is void.[10] In all states compounding a felony is an offense in itself, and consequently any agreement with that object in view would be criminal, but even if such a law did not exist, the contract would be void as tending to defeat the administration of justice.

**§ 103. Restraint of marriage.** Agreements which threaten the security of an institution recognized and encouraged by the state are illegal as against public policy. The institution of marriage is of this class; accordingly agreements between married people for future separation, contracts not to marry, or marriage brokerage contracts, are void as tending to injure the marital relation.

**§ 104. Contracts to defraud third persons.** Where a contract is entered into between two parties which has for its object or results in a fraud on a third person, the agreement is illegal and no recovery can be had. In Holcomb v. Weaver,[11] A engaged B to secure a competent contractor to erect a house for him. B engaged C and made a contract with him by which C was to pay B a sum of money for procuring the contract. In an action by B against C to recover the amount promised, the court held the contract illegal, since the transaction was a fraud on A. He had

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[8] Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; Central Shade Roller Co. v. Cushman, 143 Mass. 353.

[9] 140 Ill. 69.

[10] Williams v. Bayley L. R. 1 H. of L. 200.

[11] 136 Mass. 265.

relied upon and was entitled to the best judgment of B in selecting a competent contractor. B by recommending C for a consideration violated this, and the result was fraud on A.

**§ 105. Sunday contracts.** In most jurisdictions statutes exist prohibiting work, labor, and business on Sunday except works of necessity and charity, and hence a contract made on Sunday which does not come under the head of necessity or charity may be illegal. These statutes have been construed very strictly in some jurisdictions, and in consequence, the authorities are much in conflict, so that it is impossible to lay down any general rule as to the result of such agreements. It is common to permit a recovery for the value of service performed or property transferred as a result of the Sunday contract, the courts taking the view that these contracts, while illegal, are not immoral, and therefore they are disposed to limit the effect of such statutes.[12]

**§ 106. Acts forbidden or penalized by statute.** Frequently a statute will impose a penalty for doing a certain act but does not declare the doing of such an act to be void, and it becomes necessary to determine the proper construction of such a statute. It may be a mere revenue provision which in effect says to the parties, "You may do the act on paying the price named in the statute." On the other hand it may be intended as a punishment for the act which is also regarded as illegal. It has been suggested as a test that where parties may continue to do the act without further liability under the statute, it is to be construed as a revenue provision merely, but where an additional act subjects him to a further penalty, it is to be regarded as prohibitory of the act itself.

**§ 107. Conflict of laws.** A contract may be made in one state to be performed in another, and may be sued upon in a third. The contract may be legal or illegal in some of these states and not in the others.

The general rule is that the law of the place where the contract is made controls in any question as to its validity; and also as to the capacity of the persons entering into it. This rule applies also to promissory notes and other negotiable instruments.

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[12] Greenhood, Public Policy, 546.

It should be noted, however, that questions relating to payment, including presentation, notice, demand, protest, and damage for non-payment, are determined by the law of the place where the instrument is to be paid.

The validity of a contract concerning real estate is ordinarily determined by the law of the place where the real estate is situated. This means, of course, that deeds and other conveyances must conform to the law in force in the jurisdiction where the property is situated.

### Section 11. Impossibility.

**§ 108. Risk of loss.** Where a person gives a promise to do an act in the future, he is generally held to have assumed all the risks incident to that performance.

**§ 109. Impossibility known to one party only.** If the act to be performed is one physically possible but for some reason is impossible of performance, and that impossibility is known to only one of the parties to the agreement while the other party in good faith entered into the agreement, the contract, while unenforceable, yet will give rise to liability in favor of the person who has acted in good faith in ignorance of the impossibility. Thus A, a married man, enters into a contract to marry B. B is ignorant that A is married and enters into the agreement in perfect good faith. B will be permitted to recover damages for breach by A, but the action is really based not on the contract, although it may be so in form, but on the fraud of A in inducing B to enter into such an arrangement.

**§ 110. Subsequent impossibility.** When the parties have entered into a binding contract and performance subsequently becomes impossible, the question arises whether the party undertaking to perform is excused from further performance to the extent of not being liable in damages for breach. In determining this question the courts consider the presumed intent of the parties and the nature of the cause of impossibility. Reviewing the numerous decisions on the subject, we find that the following general rule with its exceptions is supported by the weight of authority:

1. General Rule: When after a contract has been made

it becomes impossible to perform it, the promisor is liable for breach of the contract even though the impossibility be caused by an act of God or an inevitable accident.

2. Exceptions: Subsequent impossibility will excuse performance in the following cases: (a) When the impossibility is caused by an act of domestic law; (b) When it is caused by the destruction of the subject matter of the contract through no fault of the promisor; (c) When it results from death, insanity, or sickness of the person who is to perform under a contract for personal services. Prevalence of a contagious and fatal disease in the vicinity where contract is to be performed also excuses performance; and (d) When caused by an act of the promisee; i.e., the person to whom the promise was made.

In Superintendent v. Bennett [1] A contracted to erect a schoolhouse for B. Because of latent defects in the soil, the building fell when partially completed. In an action on the contract by B, the court held that A was not excused from performing his contract. It said that he was bound by his contract notwithstanding any accident by inevitable necessity because he could have stipulated in his contract against liability in such cases. This case was not really one of impossibility. The building could have been properly erected though perhaps at greatly increased expense. But even if it were a case of impossibility of performance, A, under the general rule mentioned above, would not be excused.[2]

**§ 111. Incapacity for personal services.** A makes a contract to serve B for a period of time as clerk. Shortly after entering the service, he becomes ill and is unable to carry out his agreement. A will not be liable for failure to perform on the ground that his failure to perform is due to an act beyond his control.[3] In contracts for personal services, the courts assume that the parties intend the agreement not to be binding on either party if it is prevented by death, insanity, or sickness of either.

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[1] 27 N. J. L. 513.

[2] Yerrington v. Greene, 7 R. I. 589.

[3] Wald's Pollock, Contracts (Williston's ed.), 535.

**§ 112. Contract dependent on the existence of a particular thing.** A party may make a contract which is dependent on the continued existence of a particular thing. When the thing ceases to exist through no fault of either party, the performance is mutually excused. A contracted to rent a music hall to B for a series of concerts. Before the time of performance arrived, the building was destroyed by fire without the fault of either party. The court held that this agreement was dependent upon the continued existence of the music hall, and its destruction relieved both parties from liability.

**§ 113. Acts of war.** A contract may be rendered impossible by reason of war. The term "war" as used in this connection means armed conflict between organized governments; hence, mere insurrections, riots, and strikes, though attended by violence, will not excuse performance of a contract.[4]

**§ 114. Rights of parties where contract can not be performed on account of impossibility.** The question is frequently presented as to the rights of one who has partially performed under a contract which becomes impossible of performance without any fault on his part. In case of contracts for personal services, the courts of the United States generally allow recovery for services actually performed prior to the impossibility. Recovery is not based on the express contract but on the implied contract.

## Section 12. Mistake.

**§ 115. Mutual mistake.** Where the parties to a contract are both laboring under a mistake as to the subject matter, or an essential term of the contract, the agreement is of no legal validity, since no actual agreement with reference to a common object has been made. In Raffles v. Wichelhaus, previously cited,[1] it appeared that the minds of the parties did not meet on a common subject matter, and therefore no contract was made. Mutual mistake as to the character or value of the thing sold will not avoid the contract, where it is clear that the parties agree as to the subject matter of the sale. In Wood

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[4] Summers v. Hibbard, 153 Ill. 102.

[1] 2 H. & C. 906.

v. Boynton,[2] A sold a stone to B for one dollar. Both parties were ignorant of the nature of the stone. The stone was afterwards found to be a diamond worth $700. The contract was held binding, since it was clear that both parties intended this particular stone to be the subject matter of the sale. The contract was to sell this stone irrespective of its character.

**§ 116. Mistake by one party.** Where only one of the parties is laboring under a mistake which was not induced by the other party, the contract is binding. In Smith v. Hughes [3] A contracted to sell oats to B. A tendered new oats which B refused to receive on the ground that he thought he was buying old oats. B was held liable on the ground that the contract did not call for old oats, so A's tender of new oats was good. If it had appeared, however, that A knew that B thought he was being promised old oats, the result would have been different.

**§ 117. Mistake known to the other party.** Where a party knows or should have known that the other party is acting under a mistake, the law will not permit him to take advantage of it. In Hume v. United States [4] A agreed to furnish shucks to the United States for sixty cents a pound. It was customary to buy shucks by the hundred weight, but in the blank furnished by the United States the word pounds was printed. Since shucks were not worth more than two cents a pound, the court held that A must have known that there was a clerical error, and that the United States did not intend to accept a bid at least thirty times the real value of the thing contracted for.

**§ 118. Non-disclosure of facts.** In general it may be said that parties negotiating for a contract are not bound to disclose all the facts which might materially affect the making or the terms of the contract. Thus, if A offers to buy B's farm for $25 per acre, the ordinary value of farm land, knowing that valuable minerals have been found on adjoining lands, and B accepts the offer, A is entitled to his bargain and is under no duty to disclose to B the mining possibilities of the land which greatly increase its selling value. The parties are said to be dealing at

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[2] 64 Wis. 265.
[3] L. R. 6 Q. B. 597.
[4] 132 U. S. 406

arm's length, and B has no right to complain since A has not misled him.

If, however, A stood in a confidential relationship to B, as for example, if A was B's agent, and in the course of his duties had discovered the mineral wealth of the land, he would be compelled to make a full disclosure of the facts, if the contract were to stand.[1] The same rule is applied to all contracts where the essential facts are within the peculiar knowledge of one party, and his relation to the other party is such that good faith requires a full and frank statement. Contracts of insurance, and the allotment of shares in corporations by promoters are the usual class of agreements where this rule is applied.[2]

[1] Dambmann v. Schulting, 75 N. Y. 55.
[2] Walden v. Louisiana Insurance Co., 12 La. 134.

## CHAPTER II.

## AGENCY.

**§ 1. Agent and servant: Definitions.** In its broader sense the word agent denotes a person who represents his principal and acts under his direction, whether in performing merely operative acts or in bringing the principal into relation with third parties. More narrowly, when the employment does not necessarily involve a third party in relations with the principal—for instance when it is such an operative act as plowing the principal's field —the relation is spoken of as that of master and servant, and the relation of principal and agent is confined to the bringing of the principal into contractual relations with third parties. Of course the same person may be for certain acts a servant and for others an agent, as for example when P's plowman purchases oats for the farm horses on P's credit.

### Section 1. Competency of the Parties.

**§ 2. Capacity to act as principal.** Generally capacity to act as a principal depends on capacity to do directly the act which the appointment contemplates having done through an agent. One can not do through an agent what one is legally incapable of doing in person, but anyone who can make a valid contract can authorize an agent to make it. Conversely, the limits on one's capacity to make binding contracts are the limits of one's capacity to appoint agents.

As the act of appointing an agent is ordinarily the making of a contract, substantially the same rules regarding the capacity of infants, married women, insane persons, and other persons under disability, to contract, are applied to questions regarding their capacity to appoint agents.

**§ 3. Same: Corporations.** A corporation after it has been organized can authorize an agent to do any act it has been given charter power itself to do. Prior to its incorporation there can be no agency for it, and acts done by persons professing to act in the name of a corporation to be formed are not binding on the corporation unless it adopts them as its own subsequent to the incorporation.[1]

**§ 4. Same: Partnerships.** The partners jointly may appoint agents, and generally each partner has implied authority to appoint agents to carry out any of the purposes for which the firm exists.[2]

**§ 5. Same: Unincorporated associations.** Since these organizations are not legal entities they can not as organizations appoint agents. They are not even partnerships, so that individual members can not appoint agents to bind the society; but the members acting as joint principals may jointly appoint an agent. Ordinarily such appointments are binding only on those members who expressly or impliedly assent to them and mere membership in the society is not sufficient to constitute an assent. So in a suit brought by the publishers of a college annual against the senior class of Tufts College it was proved that all the members of the class but one were present at a meeting, voted to elect one A their business manager, and authorized him to make arrangements for publishing the book. Those voting, or assenting by presence and silence to the vote, were held liable, but the absent member was held not liable for the acts of the agent.[3] But a member may by previous assent be bound by the act of a majority, as for example where he signs a constitution which recognizes the power of a majority to bind the society by its action.

**§ 6. Capacity to act as agent.** As far as third parties are concerned, anyone may act as agent in representing a principal in dealings with them, except in cases of special sorts of agents, such as attorneys at law, where the law fixes certain requirements, and in the case of the usual provisions of the statute of

[1] Bell's Gap Ry. Co. v. Christie, 79 Pa. 54.
[2] Tillier v. Whitehead, 1 Dallas 269.
[3] Willcox v. Arnold, 162 Mass. 577

frauds, which prevents the agent who makes the memorandum required by the statute from being in fact the other principal.[4] As between the agent and the principal, the ordinary rules of contractual capacity apply. If the agent is an infant he may disaffirm his contract of employment, but if he chooses to abide by it the principal is bound on his side.

## Section 2. Formation of the Relation.

**§ 7. Essentials of the relation.** The ordinary way in which the relation of agency is formed is by a contract between the principal and the agent, by which the agent agrees to act as the principal's representative, and the principal to compensate the agent for his services. But the agreement may fall short of being a contract. All that is essential is an appointment by the principal and an acting under it by the agent. In every agency there is mutual consent of the principal and his representative.

**§ 8. Implied assent.** It is not necessary that this consent be expressed in words. It may be implied from the circumstances of a case. Thus when a wife, whose husband's work frequently took him away from home for considerable periods, during which time she managed the household, borrowed money for use in a family matter, the circumstances were held to show, even in the absence of any express appointment, that she was her husband's agent.[5]

**§ 9. Gratuitous agency.** It is not necessary that the agent receive any compensation for his services. In the case of Hill v. Morey,[6] A,[7] a neighbor of P's, merely out of friendliness offered to assist P in cutting down brush on the latter's woodlot. P permitted him to help, and A during the work carelessly cut trees on an adjacent lot belonging to T. A was held to be P's agent so

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[4] Farebrother v. Simmons, 5 B. & Ald. 33.

[5] Meader v. Page, 39 Vt. 306.

[6] Hill v. Morey, 26 Vt. 178.

[7] For purposes of convenience the initials P, A, and T will be used instead of the real names of parties in the cases discussed. P will stand for the name of the party who is a principal, A for the name of his agent, and T for the name of the third party

as to make P liable for the trespass. He had acted for P, P had permitted him to do so, and nothing further was needed to establish an agency. As between P and A, however, a mere gratuitous promise by A to act as P's agent could not be enforced by P.

§ 10. **Ratification: Definition.** It sometimes happens that an agent overstepping the authority he has been given, or one who has never been appointed an agent assuming to act in that capacity, does an act on a principal's behalf and in his name. For example, A, a farm hand, without authority to purchase land for P, his absent employer, learns of an exceptional opportunity to buy a field adjoining P's farm at a bargain, and ventures to buy it on his master's credit, T, its owner, thinking A has the requisite authority. A then writes to P of what he has done. As the act was without any authority on A's part, P is not obligated by it and may disavow it. But he has a right to assent to it and treat it as his own. If he chooses this alternative he is said to ratify A's unauthorized act. The contract made by A is binding on T, and P and A are placed in the same relation as if A had been previously authorized by P to act as he did. A does not receive any authority for future transactions, but merely as to a consummated act he is treated as if he had been an agent, and the results of ratification for all the parties are similar to those resulting from a regularly authorized transaction carried out through an agent.

§ 11. **Ratification is irrevocable.** An important corollary of the above doctrine is that a valid ratification once made can not be withdrawn by the principal.

§ 12. **Act must be performed for existing principal.** The principal who ratifies must have been a person in existence and capable of being ascertained at the time the agent made the contract. Frequently the promoters of a projected corporation do acts and make contracts in the name of the corporation prior to its organization. Such contracts can not later be ratified by the company, but it may adopt them. See page 440, § 24.

§ 13. **Act must be done on behalf of a principal disclosed to third party.** The agent can not make a contract on the chance that someone not in his contemplation at the time may step in

and take it over. Such a person's attempt at ratification would be invalid. Moreover the agent can not make a contract in his own name and obligate himself to a third party, and then, without the consent of the third party, assign it to someone who will profess to ratify it as principal. He can not show that he had this principal in mind if he does not disclose at least the fact that he is acting as an agent.

**§ 14. The principal must be competent to do the act.** If the agent enters into a contract on behalf of a principal who could not make it, whether because of incapacity on his part, as in the case of infants where their contracts are held void, or because the contract is itself illegal and therefore void, the principal can not ratify it. A principal may, however, adopt the wrongful act of his quasi agent so as to make himself civilly responsible therefor. Thus if the agent, in the course of the transactions which the principal ratifies, commits a tort, the ratification will impose liability on the principal for the tort.[8]

**§ 15. Intervening rights of strangers must be respected.** Where, prior to the attempt at ratification, parties unconnected with the original transaction between the quasi agent and the third party have in good faith obtained rights in the subject matter of the transaction, the principal can no longer ratify. Thus where an unauthorized agent had contracted to sell to T a ranch belonging to P, but before P learned of this he himself had transferred his title to another party, F, P could not then ratify A's contract and so escape from his own transactions with F.[9]

**§ 16. Intervening rights of third parties must be respected.** In America generally, the third party with whom the quasi agent has contracted may withdraw if, on finding out that the agent had no authority, he communicates his intention to withdraw to the agent or the principal before the principal has ratified.[10]

**§ 17. Transaction cannot be ratified in part only.** A principal cannot ratify as to what will benefit him, and repudiate as to the rest. He must take the burdens of his quasi agent's act

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[8] See § 17, below.

[9] McDonald v. McCoy, 121 Cal. 55.

[10] Dodge v. Hopkins, 14 Wis. 630; Andrews v. Etna Co., 92 N. Y. 596 contra.

with the benefits. In the case of Dempsey v. Chambers,[11] A without authorization from P sold and delivered to T a load of coal from P's coal yard. In delivering it he negligently broke T's cellar window. P with knowledge of these facts sent T a bill for the coal delivered. By thus ratifying A's act he became liable for damages for the broken window.

**§ 18. Ratification must be with full knowledge of facts.** Even the principal himself needs some protection from too sweeping an application of the doctrine of ratification. The assent he gives to the quasi agent's act must be a real one, with knowledge of all the facts pertinent to the transaction, or at least with a willingness to waive further inquiry.[12] If through ignorance of essential details of the transaction, due either to a mistake on the principal's part or to fraud on the part of others, the principal gives an assent which is not an intelligent one, his apparent ratification does not bind him. Thus when P approved an agent's distraint on a debtor, in the reasonable belief that he had taken certain property from a certain specified field, he was held not to have bound himself by the approval when it appeared that the property had been obtained elsewhere.[12]

**§ 19. Ratification may be expressed or implied.** In general any manifestation, whether by express words or conduct, of the principal's intention to approve the agent's act is sufficient to constitute ratification. But if a prior appointment to do the act the agent has done would have had to be in writing or under seal, or executed with any special formality, this formality should be followed in ratifying it. Apart from the formal and express methods of ratification, the question whether or not the principal has ratified is a question of evidence. Even where the principal had no express intent to ratify, if his conduct reasonably interpreted has led another person to believe that the act of the quasi agent was done by his authority, he will not be heard to deny that it was so done. A common method of ratifying an act is by accepting the benefits of it. If P receives and sells goods which A without authority bought for him, or if he accepts with-

[11] 154 Mass. 332.

[12] Lewis v. Read, 13 M. & W. 834.

out objection rents accruing under a lease which A made without authority, his conduct would amount to a ratification.[13] Even silence under some circumstances may be a proof of ratification.

§ 20. **Agency by necessity.** A husband is bound to support his wife; if therefore he wrongfully neglects or refuses to provide her with necessaries, she may still pledge his credit for the means of subsistence, even though he has forbidden her to do so or has forbidden third parties to furnish her. So also under certain circumstances of necessity a carrier of goods or a master of a ship may pledge his employer's credit in the carrying on of his principal's business and for his principal's interest.[14]

### Section 3. Form of Appointment.

§ 21. **In general parol appointment sufficient.** An agent may be appointed by an informal agreement either oral or written—technically, an appointment by parol—unless there is some statutory provision requiring a special form of appointment, or unless the authority given is to do an act which must be done under seal, as for example in many states a deed for the conveyance of land.

§ 22. **Exceptions: Statutes. Sealed instruments.** In some few states a statute of frauds provides that if any contract required by statute to be in writing and signed by the party to be charged or his agent, is in fact signed by an agent, the appointment of this agent must be in writing. Statutes in some states provide generally that an agent to make certain kinds of contracts—for example for the purchase or sale of lands—must be appointed in writing.

At common law, authority under seal is necessary to enable an agent to make a contract under seal binding upon his principal. The commonest examples of instruments under seal are deeds of conveyance and bonds. The rule applies at common law even to the filling in of any material blanks in such instruments, for example the blank left in a deed for the name of the transferee of land. One important exception to the rule is that in the case of the

[13] McDowell v. McKenzie, 65 Ga. 630; Burkhard v. Mitchell, 16 Colo. 376.
[14] McCready v. Thorn, 51 N. Y. 454.

execution of sealed instruments by an agent of a corporation his authority need not be conferred under seal. In many states the requirement of a seal has been abolished by statute, and of course here the rule has no relevance. Where, however, a seal is still required, although various relaxations of the rigidity of the common law rule have been introduced, safety lies in the appointment under seal of an agent to execute an instrument under seal.

The form of appointment of an agent is often a power of attorney, an example of which is found on the opposite page.

**§ 22a. Agency by estoppel.** In cases of agency by prior appointment or subsequent ratification the basis on which the agency arises is the will of the parties involved in the relation. But in some special cases similar responsibilities to those arising from real agencies are imposed by law on a principal for the protection of third parties. If the conduct or words of P lead a third party, T, reasonably to believe that A is P's agent, to the extent that T changes his legal position to his detriment in reliance on this belief, P is held to be a principal and A his agent for the transaction entered into between A and T. Thus where P, P's father, and T were standing by a field belonging to T, and the father proposed to T that he let P have the field on a lease, to which T agreed, P, who had stood silent and without disclaimer through all the negotiations, was held bound by the contract as if his father had been his agent, though in fact he had not authorized it. Strictly speaking there was no agency here, but the person on whose conduct a third party had relied was liable just as if there had been. The liability is imposed on him without his consent by the law, for the protection of the third party.

**POWER OF ATTORNEY.**

KNOW ALL MEN BY THESE PRESENTS, that *Louis Root* of the *City* of *Chicago*, County of *Cook*, in the State of *Illinois* has made, constituted and appointed, and BY THESE PRESENTS does make, constitute and appoint *John Anderson* of the *City* of *Chicago*, County of *Cook*, and State of *Illinois his* true and lawful Attorney for *him* and in *his* name, place and stead, to *enter into and take possession of any lands or tenements, or other real estate to which he is or may be entitled, and recover possession thereof, and damages for any injury done thereto.*

Giving and granting unto *John Anderson* said Attorney full power and authority to do and perform all and every act and thing whatsoever, requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as *he* might or could do if personally present at the doing thereof, with full power of substitution and revocation, hereby ratifying and confirming all that *his* said Attorney or *his* substitute shall lawfully do or cause to be done by virtue hereof.

IN TESTIMONY WHEREOF, *I* have hereunto set *my* hand and seal this *sixth* day of *November*, 1937.

Signed, Sealed and Delivered in Presence of — *(Signed) Louis Root* [SEAL]

*(Signed) William Mason*
*(Signed) John Essington*

State of *Illinois* }
County of *Cook* } ss.

I, *Roy Nelson, a Notary Public* in and for, and residing in the said County, in the State aforesaid, Do HEREBY CERTIFY, that *Louis Root*, personally known to me to be the same person whose name *is* subscribed to the foregoing Instrument, appeared before me this day in person, and acknowledged that *he* signed, sealed and delivered the said Instrument as *his* free and voluntary act, for the uses and purposes therein set forth.

GIVEN under my hand and *notarial* seal, the *sixth* day of *November*, A. D. 1937.

*(Signed) Roy Nelson.*

[SEAL]

§ 23. **Revocation by the principal.** The authority of the agent is conferred by the principal, to be exercised at his direc

tion and for his ends. If therefore the principal wishes to discontinue the relation for any reason, he is allowed to do so, unless there are special circumstances giving the agent power to exercise the authority conferred upon him even against the principal's wishes. The principal may wish to abandon the enterprise in which the agent represents him, because it is unprofitable or troublesome, or for any or no reason. In the case of Brown v. Pforr [1] A, a real estate agent, sued on a contract made with him by P, by which P agreed to pay A $750 if A would find within one month a buyer for P's land at $75,000. Within the month A had found a purchaser, but before this P had notified him that the agency was revoked. It was held that P was not liable to A. As the court remarked: "The rule that in this class the principal may revoke at any time before *complete* performance by the broker unless he has expressly otherwise agreed may be a harsh rule, but, if it is, it would seem a very easy matter for the broker to protect himself against it."

**§ 24. Rights of the agent on revocation.** The opinion above suggests a limitation on the power of the principal to revoke. If the agent has a contract of employment fixing a definite time for the termination of the agency, this amounts to an agreement on the principal's part not to exercise his power to revoke the agent's authority. He may still do so, but if he does so in unexcused breach of the contract, he renders himself liable to the agent in damages. The authority may be withdrawn, but the contract cannot be broken without this liability.

**§ 25. Necessity of notice of revocation.** Notice of revocation is in general necessary to make it binding on the agent and the third party. Thus notice should be brought home to all those to whom the principal has held out the agent as having authority. They are entitled to such notice as would serve to put a reasonably prudent man on inquiry. Actual notice should be given to all who have extended credit to the agent in reliance on his authority, and general public notice to others.[2]

**§ 26. Renunciation by the agent.** Just as a principal has

[1] Brown v. Pforr, 38 Cal. 550.

[2] Claflin v. Lenheim, 66 N. Y. 301.

power to dismiss his agent at will, so also an agent can leave his employment at will. Practically the same rules govern renunciation by an agent as govern revocation by a principal. A renunciation need not be in express words; for example a mere abandonment of the work by the agent may be taken by his principal as an indication of an intention to renounce the agency. Notice of the renunciation must reach the principal to make it effective between him and his agent, and the principal must give notice to third parties in order to protect himself from further contracts being made by the agent.

**§ 26a. Death of a party or dissolution of a corporation or partnership.** The death of either party terminates a mere agency. After the death of the principal, acts done by the agent are not binding on the principal's heirs or representatives. Nor can these parties compel the agent to continue his employment. So where A contracted to work for P for a year as a farm hand, and P died at the end of four months, but A went on working and sued P's estate for subsequently rendered services, it was held that the estate was not liable. The same rule applies in the case of the death of the agent. Money due him, for example, on goods sold for his principal should therefore be paid to the principal, and not to the agent's administrators.[3] The dissolution of a corporation or partnership terminates an agency in which the association was either principal or agent,[4] but does not necessarily free it from liability on the agency contract. The harshness of the common law rule that the death of the principal immediately and without notice puts an end to his agent's authority has led to the enactment of statutes in several states making valid the acts of agents done after a principal's death, if done in bona fide ignorance of that fact.

**§ 27. Same: Various changes of condition of one of the parties.** If either party becomes bankrupt, since the bankruptcy divests him of all control over his property, the relation of agency will thereby be terminated as to all rights affected by the bankruptcy. The illness of the agent, if it incapacitates him from performing his duties, puts an end to the agency; but the illness

[3] Merrick's Estate, 8 Watts & S. 402.
[4] People v. Globe Ins. Co., 91 N. Y. 174.

of the principal will not usually have such an effect. If the marriage of the principal affect his rights in the subject matter of the agency, such agency will be terminated. For example, where marriage gave P's wife an interest in land which P owned, and which he had given A a power of attorney to sell, the marriage was held to nullify A's power of attorney.[5]

§ 28. **Irrevocable agencies: Powers granted for the protection of the agent.** Wherever a principal has conferred on an agent his authority as a security for some debt owed by the principal to the agent, the authority is irrevocable, at least by the principal himself. In such a case the agent's power is said to be "coupled with an interest" in the subject matter of the agency. Thus in the case of The Pacific Coast Co. v. Anderson Co.,[6] P gave A, as security for a debt, a power of attorney to collect all such freights as should become due to P under the charter of a vessel, and to apply them to the vessel's hire. It was held that this power of attorney, having been given for a valuable consideration and as a security for the payment of money, was irrevocable by P.

§ 29. **Same: Powers coupled with an estate.** Some courts hold that such a power is not revoked even by the death of the principal, but in America generally a distinction is made between powers of attorney irrevocable during the life of the principal (inter vivos), of which the case just cited is an example, and powers irrevocable even by death. The latter must be powers coupled with an interest in a stricter sense than is a power given to secure a debt by control over the proceeds of the exercise of the power. By power coupled with an interest these courts mean a power coupled with a property interest in the subject matter of the agency itself—an actual estate in the thing the agent has been authorized to deal with. Such a power is irrevocable even by the death of the principal or agent, or any change of condition, such as insanity, bankruptcy, or marriage. In the case of Norton v. Whitehead,[7] P, a contractor, had borrowed from A, his foreman, various sums to enable him to carry out a

[5] Henderson v. Ford, 46 Tex. 627.
[6] Pacific Coast Co. v. Anderson Co., 107 Fed. Rep. 973.
[7] Norton v. Whitehead, 84 Cal. 263.

contract. Later he executed to A an assignment of all moneys due or to become due . . . "for any work I may perform, . . . the assignment to remain good until all notes due or which are to become due . . . from me are paid." Still later P gave A a power of attorney authorizing him to collect all moneys due or to become due to P by reason of his performance of the contract he was engaged on. P died, and the work was finished by his administrator, who collected the moneys due, claiming that A's power of attorney was nullified by P's death. In a suit by A it was held that his power was one coupled with an interest in the subject matter of the agency. This subject matter, the court said, was "all moneys that were to become due" to P by reason of his performance of the contract. Such a power, it was held, was not revoked even by death, and so A was entitled as against the administrator to the payment under the contract.

### Section 4. Obligation to Protect.

**§ 30. Protection from injury: In general.** The master is bound to use reasonable care to prevent his servant from being injured in the course of his employment. If he does not exercise this care, and a servant is injured on account of his failure to do so, he is liable to the servant in damages, unless the injury has arisen from a risk placed by law upon the servant or voluntarily assumed by him; or unless the servant by his own acts or negligence directly contributed to the injury. The master, in other words, is not liable for all injuries occurring in the course of the servant's employment, but only for those of which his own neglect of duty is the proximate cause.

**§ 31. Classification of duties.** The duties of the master to protect his servants may be classed as follows: To provide and maintain, by suitable inspection and repair, a safe place to work; safe machinery and appliances to work with; a sufficient force of competent fellow servants; rules and regulations for the service, properly made, promulgated, and enforced; and special instruction, warning, and regulation, provided in cases of particular servants or exceptional situations.

**§ 32. Duty to provide a safe place to work.** The master is bound to use reasonable care and diligence to provide his servants with a reasonably safe place to work. If the servant receives injuries through improperly lighted buildings, unsafe floors, dangerous bridges, or other fault in the construction or maintenance of the places where the master sends him to work, the master is responsible and the servant can recover damages from him for the injury.[1] But if the place is unsafe merely because of the nature of the work and not through any failure of the master to take reasonable precaution to make it safe, then the master is not liable. A high bridge is obviously not so safe a place for work as a law office, but the risk the servant runs on the bridge he is set at building is due not to the master's neglect but to the very nature of his employment.

**§ 33. Duty to provide and maintain safe appliances and machinery.** The master owes the duty of using reasonable care to provide and maintain for his servants appliances and machinery suitable and safe for their work. Thus a railway company was held liable to an engineer injured by the explosion of the defective boiler of his engine, where the company by its agents had not taken reasonable care to see that he had been provided with a safe locomotive.[2] The master is not bound to use the best machinery obtainable nor the latest improvements, but he is bound to use appliances reasonably adapted to and safe for the intended purpose and under present-day conditions.[3] If the servant uses appliances for other than their intended purpose, or does not use the safeguarding apparatus provided him, he cannot recover.[4] For example, a lineman who neglects to use his gloves and is injured by a live wire in consequence cannot get damages for his injury.

**§ 34. Duty to inspect and repair.** The master must use reasonable care, by proper inspection and repairs, to keep the place where he puts his servants to work and the appliances and

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[1] Chicago, etc. Ry. Co. v. Jackson, 40 Tex. Civ. App. 273; Roundy v. United Box etc. Co., 103 Me. 83.

[2] Ford v. Fitchburg Ry., 110 Mass. 240.

[3] McDonald v. Cal. Timber Co., 94 Pac. Rep. 376 (Cal.).

[4] Kauffman v. Maier, 94 Cal. 269; Maitrejean v. Ry. Co., 133 N. C. 746

machinery which he furnishes them in properly safe condition. Thus where a mason was killed by the fall of a derrick caused by the wearing through of a steel cable supporting it, and it was shown that no inspection was made though the master knew the consequences of wear on the cable and the certainty that such wear was bound to occur, the master was held liable.[5] The inspection required must be reasonably frequent, but it is not required to be so frequent or so detailed as seriously to impede the progress of the work. Thus where an inspector was sent around every afternoon to inspect the floor of the sawroom of a paper mill, and "to see that everything was all right," this was held a sufficient discharge of the master's duty of inspection, so as to exonerate him in a case where one of his servants had been injured by being struck by a block of wood which fell through a trapdoor in the sawroom floor, carelessly opened by a workman after the daily inspection. The court said: "The duty of inspection is one which must be enforced in a reasonable manner and . . . does not require unceasing and impracticable performance."[6]

**§ 35. Duty to provide a sufficient force of competent fellow servants.** The master must use reasonable care to provide his servant with a sufficient force of fellow servants to do with reasonable safety the work the servant is set at. Thus where S, a brakeman on a train of the M. Co., was injured in a collision with another train of the same company, and the cause of the collision was an insufficient force of brakemen on the second train, the M. Co. was held liable. Nor was it any defence that the company had hired the needed additional brakeman and he had failed to report for duty. The train should not have been started out with an insufficient force.[7] The master must also use reasonable care as to their competence, in selecting the servants. He is bound to be careful not to employ negligent, unskilled, or otherwise incompetent servants. When a manager of the M. Telephone Co., on receiving a report of a broken wire and finding no lineman an hand, sent out a young office man, F, with no experience

[5] Rincicotti v. O'Brien Contracting Co., 77 Conn. 617.
[6] Peet v. Paper Co., 86 App. Div. (N. Y.) 101
[7] Flike v. B. & A. Ry. Co., 53 N. Y. 549.

to assist a regular lineman, S, and F brought a live wire in contact with S's body so that S was killed, the M. Co. was held liable for its breach of duty, through its manager, to provide a competent fellow servant for S.[8]

**§ 36. Duty as to rules.** The master is bound to use reasonable care to make, promulgate, and enforce rules and regulations governing the operations of his servants, so as to afford servants obeying them a reasonable protection in the discharge of their duties. In the case of Abel v. Delaware &c. Ry. Co.,[9] a car repairer while under a car on a sidetrack making repairs was killed by an engine backing against the car. No regulation to safeguard men in making repairs on stationary cars had been made by the company, and on this account it was held liable to the representative of the deceased. It is not sufficient to formulate rules; they must also be published, for example by posting them about the premises or otherwise giving servants a reasonable opportunity to learn them.[10] The master also must use reasonable diligence in enforcing rules, and if they fall into disuse through his failure to be vigilant in insisting on their observance he is liable if his servant is injured thereby.[11]

**§ 37. Duty as to special orders, etc.** In addition to general rules, the master has a duty to use reasonable care to give special orders in special cases or unusual situations,[12] and to give instruction and warnings to employes in case the putting of inexperienced or immature workmen at an unfamiliar task, or at any task the risks of which are not patent to them, would lead a reasonable man to consider instruction or cautioning necessary. Thus in the case of L. & N. Ry. Co. v. Miller,[13] a switchman who had had, as the yardmaster knew, but five days' experience, and that as a volunteer member of a switching crew, was assigned by this yardmaster to a crew without further advice, warning, or instruction. Evidence tended to show that four weeks' ex-

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[8] Scott v. Iowa Telephone Co., 126 Ia. 574.
[9] 103 N. Y. 581
[10] Strong v. Rutland Ry., 121 App. Div. (N. Y.) 391.
[11] Merrill v. O. S. L. etc. Ry. Co., 29 Utah 264.
[12] Hankins v. N. Y. Ry. Co., 142 N. Y. 416.
[13] 104 Fed. Rep. 124.

perience as learner was requisite to acquaint one with the risks of such a position. The switchman in the exercise of his duties attempted to make a coupling which was new to him, and which could be done safely only in a particular way of which he knew nothing. He was injured and the master was held liable. The court said: "The law is now well settled that the duty of cautioning and qualifying an inexperienced servant in a dangerous occupation applies as well to one whose disqualification arises from a want of that degree of experience requisite to the cautious and skillful discharge of the duties incident to a dangerous occupation, as when the disqualification is due to youthfulness, feebleness, or general incapacity. If the master has notice of the dangers likely to be encountered, and notice that the servant is inexperienced, or for any other reason disqualified, he comes under an obligation to use reasonable care in cautioning and instructing such a servant in respect to the dangers he will encounter, and how best to discharge his duty."

**§ 38. The servant's right to rely upon performance by the master.** In the case of these duties of the master the servant may rely on a performance of them by the master unless he happens to know, as a matter of fact, that the master has not done his duty, or unless a reasonable person in the same circumstances would have observed this. He does not have to make any observation for himself.[14]

**§ 39. Non-delegable character of these duties.** The duties above enumerated, the master is bound to see performed. He may discharge them in person or by deputy, but the delegation of the discharging of the duty to a deputy, even where the master uses the greatest possible care in his selection, does not free the master from responsibility. His duty is to have reasonable care exercised in safeguarding the workmen. If his carefully selected and competent foreman should without warning become incompetent, and neglect to provide, for instance, proper inspection for a workroom, the master is still liable to a servant injured in consequence of this neglect. Reasonable care in selecting a substitute is not equivalent to reasonable care in actually

[14] Silveira v. Iverson, 128 Cal. 187.

carrying out the duty imposed by law on the master. The master is exonerated in the case of delegated duty only when the delegate does in fact himself exercise reasonable care.

§ 40. **Qualifications of the rule: In general.** The liability of the master is subject to two qualifications. The servant may have voluntarily assumed the risk of injury arising from the master's failure to discharge any of his duties of protection; or he may have contributed to the injury through his own negligence. In either of these cases the master is not liable for the injury arising from his failure to provide the various protections under discussion.

§ 41. **Same: Voluntary assumption of the risk by the servant.** We have seen that the servant may presume, in entering on his employment, that his master has discharged his duty of provision against risks; but if he does in fact know that the master has not performed these duties, for instance that the premises or machinery are unsafe, and not merely knowing their physical condition but also appreciating the risk this involves, he undertakes the employment, he cannot then recover against the master for any injury received from the non-fulfilment of the master's duties in these regards. His voluntary assumption of the risk is a defense to the master. So also, if after he has begun work he then at any time discovers the master's non-performance of his duty, and yet without complaint and without any promise by the master or his representative that the defect will be remedied, he chooses to go on working, this also will be a defence to the master. A teamster was injured under the following circumstances: He was driving a four-horse lumber wagon which had no seat, and the lines of which were too short for driving four horses. He knew these defects but continued working for several months, until in consequence he was pulled under the horses' hoofs and injured. It was held that he had voluntarily assumed the risk and could not recover.[15] If, however, the servant complains of a defect and receives a promise of repair, he may, in reliance on the promise, continue a reasonable time using the defective apparatus or working in the dangerous place, unless the

[15] Lemberg v. Glenwood Lumber Co., 145 Cal. 255

danger is so imminent that no reasonably prudent man would continue to work. In the case of Anderson v. Seropian,[16] S was a box-printer, who, after working a defective press, complained to a foreman that he did not like to run it at the speed demanded of him. The foreman said: "Go ahead, and when you get far enough ahead with the material for the box-makers to work on, why then we will fix the machine." S worked on, and that afternoon his hand was mangled in the machine. It was held that he had not assumed the risk. He had complained and had a promise of repair. But if upon complaint the master refuses to repair or makes no promises, remaining at work will be held a voluntary assumption of risk.

**§ 42. Same: What assumption is voluntary.** It is to be noted that the assumption of risk must be voluntary. Hence it must be shown by the master that the servant both knew of the risk and also appreciated its character. It is not enough to know the existence of a defect; the servant must also understand in general the risk its continuance involves. Hence also if the servant is acting under compulsion he does not assume the risk so as to free the master from liability. Thus where a Polish boy, unable to speak or understand English, is pushed by a foreman and frightened into going in between two shaky piles of timber to work, he has not assumed the risk of injury from their falling.[17] But in America it is generally held that a mere fear of loss of employment, even if induced by a threat of discharge unless S works under the additional risk, is not sufficient to constitute coercion. Thus in the case of Lamson v. Axe Co.,[18] S, a painter of hatchets, complained of a new rack for the fresh-painted hatchets as more dangerous than the old, because the hatchets were likely to fall on him. He was told to use the rack or leave. He stayed, and the accident he feared happened. When he sued the master he was held to have assumed the risk. The court said: "The plaintiff appreciated the danger more than anyone else. He complained and was notified that he could go if he would not face the chance. He stayed and took

[16] 147 Cal. 201.
[17] Wells & Co. v. Gortorski 50 Ill. App. 445.
[18] 177 Mass. 144.

the risk. He did so none the less that the fear of losing his place was one of his motives."

**§ 43. Same: Contributory negligence of the servant.** A servant cannot recover for injuries to which he has contributed directly by his own fault. He is bound to use reasonable care to protect himself from injury. If he does not, and his lack of care has been a proximate cause contributing to the injury, he cannot recover. Thus where a servant stepped without looking into a well lighted elevator shaft, even though the door, which should have been kept shut, had been left open through another servant's carelessness, his own negligence so contributed to the accident that he could not recover for injuries from his fall.[19] For what constitutes contributory negligence see Chapter III, §§ 68-72.

## Section 5. Exception to Obligation to Protect: Fellow Servant Rule.

**§ 44. The nature of the fellow servant rule.** The master is not bound to protect the servant from all risks incident to his employment. In the absence of statute the burdens of these risks are divided between the master and the servant. On the servant the law imposes the risks ordinarily incident to an employment of a given nature: the danger from wind and ice connected with bridge building; electric shock or breaking rope or wire incident to a telephone lineman's work; and the similar hazards arising out of the very nature of any particular employment. In addition to these, the common law requires the servant rather than the master to assume the risk of injury from the negligence or wilful misdeed of a fellow servant. He has of course a right of action against the wrong-doer himself, but not against the master as he might have in case he were not himself in the master's employ. As we shall see later (Section 7) a master is ordinarily liable to a person injured by his servant, if the injury is inflicted by the servant in the course of his employment and with an intention of serving the master. But if the injured person is a fellow servant of the wrong-doer,

[19] Leahy v. U. S. Cotton Co., 28 R. I. 252.

the master is not liable to him. This is what is known as the fellow servant rule. It is an exception to the ordinary rule of agency which imposes liability on the master for the misdeeds of his servant in conducting his business. The fellow servant rule places this risk of injuries from a fellow servant, with the risks incident to the nature of the business, on the shoulders of the servant, always, however, leaving him his remedy for the injury against the actual wrong-doer, the fellow servant who inflicted the injury. Thus where an engineer was injured by reason of the negligence of a switchman who so managed his switch as to derail the engineer's train, the engineer was not allowed to recover from the railway, because the injury was inflicted by his fellow servant, the switchman.[20]

**§ 45. Limitations on the fellow servant rule: Master liable if participating in the injury.** It has been observed that the actual wrong-doer is liable to the injured servant. The master owes the servant a duty not to injure him by his own negligence or wilful wrong. Even if he works side by side with the servant, he does not thereby become a fellow servant so as to free himself from liability under the fellow servant rule.[21] So also if the injury resulted from the master's negligence or wrong combined with that of a fellow servant, both contributing to the injury. Thus where a fireman was killed by the derailing of his engine while it was running backward at high speed, and the evidence showed that the accident would not have happened but for the defective condition of the track, though the excessive speed at which the engineer ran was a contributing cause, the fireman's estate recovered from the master for his failure to use reasonable care to provide a safe place to work.[22]

**§ 46. Same: Master liable for a vice-principal's wrong.** As we have seen, although a master may delegate his discharge of the duties of protection he owes his servant to another, he does not therefore relieve himself of responsibility for their proper discharge. If the person to whom he delegates them is a fellow servant of the one injured through their negligent discharge, his

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[20] Farwell v. Boston & Worcester Ry., 4 Metc. 49.

[21] Ashworth v. Stanwix, 3 El. & El. 701.

[22] Shugart v. Atlantic Ry. Co., 133 Fed. Rep. 505.

function as vice-principal, acting in the place of his master, takes him out of the fellow servant class. He is for the time being a representative of the master rather than a fellow servant of the servant whom he injures. His vice-principalship depends not on his relative rank among his master's servants, but on the character of his duties as representative. A man may be both a fellow servant and a vice-principal, depending on the task he is upon at a given time. Thus in the leading case of Crispin v. Babbitt,[23] a general superintendent of M's iron works negligently turned on steam in one of the shops and started a wheel on which S was at the time working. This was an operative act rather than a discharge of one of the master's personal duties, so that the general superintendent was for the time being a fellow servant of the injured servant, and the master was therefore not liable. On the other hand, a servant in a very subordinate position may yet act as a vice-principal. So servants employed in digging a trench for a conduit later to be put in by S were held not to be S's fellow servants, but to be performing the master's duty of providing a safe place to work.[24] So also servants supplying machinery or appliances, or carrying on inspection or making repairs, are vice-principals.

§ 47. **The superior servant doctrine.** A number of jurisdictions determine the applicability of the fellow servant rule not by the nature of the task the servant is performing, but by the grade or rank of the servant causing the injury to his fellow servant. This is called the "superior servant" doctrine, and in its most sweeping form may be stated thus: Where one servant is placed in control over another servant, and the subordinate is injured by the superior servant in the course of the employment, the master is liable for such injury. Some states hold this doctrine only to the extent that the master will be liable for injuries resulting from the negligence of the superior servant in exercising the control over the subordinate given him by his master. Some additional states, though repudiating the rule generally, hold that the general manager of a business or of a distinct department of a business is a vice-principal by virtue of his posi-

[23] 81 N. Y. 516. But see Cody v. Langyear, 103 Minn. 116.
[24] Eichholz v. Mfg. Co., 73 N. Y. Supp. 842.

tion. So the general superintendent of a gas light company, and even the manager of a grain elevator, have been held vice-principals by virtue of their position.[25]

§ 48. **The different department doctrine.** Another variation from the rule of the master's non-liability is the different department exception. It may be stated thus: If the injured servant is in a different department of the master's general business from the servant who causes the injury, the master is liable, as such servants are not fellow servants. Thus, in a leading Illinois case, a laborer in a railway carpenter shop was crossing the tracks of the railway, and was struck by a negligently driven locomotive. The railway was not allowed to avail itself of the fellow servant rule. The court said the reason of the rule "does not, nor can it, apply where one servant is employed in a separate and disconnected branch of the business from that of another servant. A person employed in a carpenter shop cannot be required to know of the negligence of those entrusted with running trains or handling engines on the road."[26]

§ 49. **Who are fellow servants: In general.** It is generally agreed that in order to be considered fellow servants servants must be in the employ of the same master and in a common employment. As we have just seen, some courts hold that if servants are in distinct departments of a common employment they are not fellow servants, and some courts hold that if the negligent servant is the superior of the injured servant they are not fellow servants, within the meaning of the fellow servant rule. All courts agree that if the negligent servant is, at the time he commits the wrong which results in the injury complained of, engaged as the master's representative in discharging any of the personal duties which the master owes his servants, he is not within the fellow servant rule.

§ 50. **Same: Servants having a common master.** Persons are not fellow servants unless they are servants of the same master, even though their employment brings them into contact with each other. Thus in the case of Swanson v. North Eastern

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[25] Zentner v. Gas Co., 126 Wis. 196; Meier v. Way, 136 Iowa, 302.

[26] Ryan v. C. & N. W. Ry., 60 Ill. 171.

Ry. Co.,[27] S, a signalman hired by the Great Northern Ry. and wearing its uniform, was employed as a member of a joint station staff to signal trains for the Great Northern and the North Eastern Ry. Co., the other occupier of the station. He was injured by the negligent backing of a North Eastern train upon him while he was at work. He was held not to be a fellow servant of the negligent engineer. Thus also servants of a master and an independent contractor, though working side by side in a common employment, are not fellow servants since not under a common control. So the servant of a teamster working on a wagon along with the servants of a steel mill in getting steel plates properly adjusted on the wagon, is not their fellow servant, for he is not under the same control.[28] If, however, S, the servant of M, is transferred to the service of N with S's knowledge and consent, after he has entered on his new employment he becomes a fellow servant of N's servants. Thus, in a leading English case, a colliery company had placed a hoisting engine with its engineer L under the control of one W, a contractor who was sinking a shaft under contract with the company. L was paid by the company, but was, as he knew, under W's direction. L went to sleep at his post, and in consequence R, an employe of W's own, was struck by a falling bucket and injured. It was held that L and R were fellow servants in the employ of W, though L was in the general employ of the colliery company.[29] So also a volunteer who places himself under the control of a master becomes the fellow servant of the other employes of the master working for a common purpose.

§ 51. **Same: Servants having a common employment.** To be fellow servants the servants must be in a common employment, working for a common end. A master may be engaged in two businesses totally disconnected except as to ownership. The employees in one business are not fellow servants of those in the other. Thus where a hod carrier employed by M on a building extension of his butcher shop was struck by a carelessly driven butcher cart going out with meat, he was not prevented from

[27] 3 Ex. D. 341.
[28] Otis Steel Co. v. Wingle, 152 Fed. 914.
[29] Bourke v. Colliery Co., 2 C. P. D. 205.

recovering from the master on account of the fellow servant rule. The court said of the two men: "They were employed under such different capacities and different classes of work that they are not to be deemed fellow servants engaged in the same common work, and performing duties and services for the same general purposes." [30]

§ 52. **Statutory modifications of the fellow servant rule.** The frequent harshness of the workings of the fellow servant rule has led to the passage of numerous statutes modifying the duties and responsibilities of masters and servants. In some states the superior servant doctrine is enacted into law, and in others the departmental limitation on the fellow servant rule. A number of states have passed statutes, some of them confined in operation to railways, imposing on the master a general liability for injury to a servant by the negligence of a fellow servant, unless the injured servant has been contributorily negligent. Contracts waiving the benefit of these statutes are made illegal. Even without such a provision the Alabama courts hold them void.[31]

In many states workmen's compensation statutes establish schedules of compensation for injuries to employees in certain occupations, to be ascertained and allowed without suit. They abolish the fellow servant rule and the defenses of contributory negligence and assumption of risk as to employers who refuse to come under them.

### Section 6. Obligations of Agent to Principal.

§ 53. **The duty of obedience.** One of the agent's cardinal duties is obedience to his principal's will. For losses to the principal resulting from the agent's disobedience the agent is liable, even though he acted in entire good faith and in the exercise of his own best judgment when he disregarded the principal's wishes.

§ 54. **Same: Gratuitous agents.** Even if the agent is to get nothing for his services, if he has undertaken to act for the principal and has embarked on the performance of his task, he is

[30] McTaggart v. Eastman Co., 28 N. Y. Misc. 127.

[31] Hissong v. Ry., 91 Ala. 514.

liable if he does not obey his principal. If, however, the gratuitous agent has never entered on the performance of his voluntarily assumed duties, he is not liable for damages resulting from his non-action, there being no consideration to support his undertaking to act.[1]

§ 55. **Same: Exceptions.** An agent is not bound to obey an instruction to do an illegal or immoral act. In a case where urgent necessity or a very grave emergency, not admitting of delay for consultation with the principal, causes a deviation from instructions, the agent, if he uses in good faith his own best judgment, will be excused, even though it later appears that another course would have been preferable.

§ 56. **Loyalty.** **Another cardinal duty of the agent is to act** in entire loyalty and in the utmost good faith toward his principal. The agent is not allowed to occupy a position which will even tend to lead to a betrayal of his trust. Where the agent of a woman principal induced her to invest her capital in a company heavily in debt, and in which he was a leading shareholder, and did this without disclosing these facts to her, he was held liable for a loss she suffered through the investment, even though no wrongful intent on his part was alleged or proved.[2] Even after the agent has left the principal's employment, he may be prevented by an injunction from revealing to his new employer trade secrets learned in working for his former principal.[3]

§ 57. **Same: Agent cannot make personal profit out of his transactions.** Apart from his lawful compensation, commission, or salary, an agent can make no profit from a transaction in which he represents a principal. If for example by using, without the principal's knowledge or consent, information acquired in the transaction, he makes any profit for himself, the principal may compel him to account for it. So if an agent sells property entrusted to him for sale at a higher price than that set by the principal, or a higher price than that which he represents to his principal that he received, or if a purchasing agent buys for less than the price set, in each of these cases he must surrender his

[1] Thorn v. Deas, 4 Johns, 84.
[2] Sterling v. Smith, 97 Cal. 343.
[3] Merryweather v. Moore, (1892) 2 Ch. 518

gains to the principal.[4] So also if an agent is employed to sell or lease P's property he cannot without P's consent sell directly or indirectly to himself, or to a third party through whom he will acquire title to the property or some benefit in it. P may repudiate the transaction and recover the property.[5] If an agent is employed to buy or lease he cannot buy from himself, nor can he buy or lease such property for himself without the principal's consent.[6] So rigidly are these rules enforced that no custom of a market allowing the agent to deal with the principal on his own behalf will be, unless the principal consents, an excuse to the agent for the breach of this duty.[7]

§ 58. **Same: Agent cannot represent both parties.** An agent cannot secretly represent the other party in any transaction on behalf of his principal in which his discretion is enlisted.[8] If, however, his work is merely to bring the parties together, and has nothing to do with the formation of the contract, he may thus act for both.[9] But wherever his duty to one principal may possibly conflict with his service to a second, he cannot serve the second also without the knowledge and consent of the first. Of course if the agent makes a full disclosure of all material facts concerning the transaction, the principal may waive his rights under the rule. He may allow the agent to represent himself or a third party.

§ 59. **Care, skill, and diligence: Paid agent.** An agent who acts for a valuable consideration is bound to possess and exercise such care, skill and diligence as are exercised by careful and prudent persons engaged in such undertakings under similar circumstances.

§ 60. **Same: Gratuitous agent.** Even when an agent acts gratuitously, if he professes to have special skill, he is liable if he does not exercise it. If he makes no profession he is liable if he is negligent, judged by the ordinary standard set for such

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[4] Wooster v. Nevills, 73 Cal. 58; N. P. R. Co. v. Kindred, 14 Fed. Rep. 77.
[5] Winter V. McMillan, 87 Cal. 256.
[6] National Bank v. Seward, 106 Ind. 264.
[7] Robinson v. Mollett, L. R. 7 H. L. 802.
[8] Rice v. Wood, 113 Mass. 133.
[9] Rupp v. Sampson, 16 Gray 398.

gratuitous services.[10] In any case he is liable if he fails to exercise the skill which he actually possesses.

§ 61. **Accounting.** The agent is bound to keep correct accounts of his transactions and to account to his principal for all money or property which comes to his hands from the principal. If he commingles these with his own so that they cannot easily be distinguished, everything which he cannot clearly prove to be his will be held to belong to the principal.[11]

§ 62. **Communication.** The agent must give notice to his principal of all material facts coming to his knowledge in relation to the subject matter of the agency.[12] The third parties who deal with him have a right to expect that communications made to him will be binding on the principal, and the agent owes to the principal that these communications be transmitted to the principal for his guidance in the general direction of the enterprise.

§ 63. **Personal discharge of his functions as agent.** Unless the principal has expressly or impliedly consented to the employment of a substitute, the agent must render his service in person. So agents to sell, buy, or lease property, attorneys, arbitrators, executors, auctioneers, and in general all agents whose duties require training, skill, judgment, or other personal qualities, cannot delegate their authority. But an express power to delegate may be given, and the appointment to certain agencies implies consent on the part of the principal that the agent may act through a substitute.

§ 64. **Same: Ministerial acts.** Where the duties to be performed are mechanical or ministerial the agent is allowed to delegate them. Thus an agent to execute a promissory note, if he has himself decided to make the note, may direct his bookkeeper to write the instrument.[13]

§ 65. **Same: Delegation customary in the particular business.** When the principal should reasonably contemplate the

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[10] See Briggs v. Spaulding, 141 U. S. 132—a case of bank directors.

[11] Gray v. Haig, 20 Bev. 219.

[12] Devall v. Burbridge, 4 Watts & S. 305.

[13] Commercial Bank v. Norton, 1 Hill 501.

employment of sub-agents as a normal or necessary way of transacting the particular sort of business he entrusted to the agent, he will be held to have impliedly consented to the delegation. So an agent given general charge of a large lumber, ranch, and mining company's business, could delegate to a sub-agent the purchase of blasting supplies.[14]

**§ 66. Consequences of a permitted delegation.** In all these cases, if the right to delegate authority to a sub-agent is found, the principal will be liable to third parties for the acts of the sub-agent. Whether, however, the principal will be able to recover against his original agent for an injury through the negligence or otherwise of a sub-agent, depends on the interpretation of the contract between the principal and the original agent. If the agent employs the sub-agent as a complete substitute for himself, in other words if the contract is that the original agent is to appoint another person agent in his stead for the principal, then he himself is liable to the principal only if he has been negligent in the selection of the second agent. If, however, the agent is authorized only to appoint the sub-agent as his own assistant, this substitute is the agent of the agent and not of the principal, and the original agent is liable to the principal for the carrying out of the agency. Different courts interpret the same contract in this matter in different ways; for example, where a bank appoints a sub-agent to collect a note at another place for a customer of the bank, the agent at the place of collection is held by many courts to be the owner of the note, but by others. including the Federal courts, to be the agent of the bank.[15]

## Section 7. Principal's Responsibility for Torts of Agent.

**§ 67. Reason for holding the principal responsible.** A principal is liable to third parties for the use made by the agent of the authority the principal has vested in him. This authority may be so used or abused as to involve the principal in obligations

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[14] Luttrell v. Martin, 112 N. C. 593.

[15] Exchange Bk. v. Third Nat. Bk., 112 U. S. 289; Dorchester Bk. v. New England Bk., 1 Cush. 177.

under a contract or in liability for a tort. A principal is held responsible not only for the acts he has expressly or impliedly authorized, but also for acts which his authorization made possible, even though he did not contemplate them—acts the result of the agent's carelessness, stupidity, or viciousness, but owing their genesis to the employment.

§ 68. **Torts actually authorized.** If the tort is expressly commanded the master is liable. The authorization may be by ratification as well as by previous direction. If the act is not one authorized, but the form of the instruction, not unreasonably interpreted, led the servant to think he was so authorized, the master is liable. Thus if M tells S to go and get T's team from the stable and use it, and S gets it without asking T's permission, and in using it, by his lack of skill lets a horse be killed, M is liable.[1]

§ 69. **Torts necessarily or usually incident to an authorized course of action.** Again, if the act complained of is a necessary or usual incident to the actually authorized act or course of action, the master is liable to the injured third party for its commission. Thus, a salesman left in charge of a store has implied authority to cause the arrest of a shopper suspected of theft. Where such a salesman, erroneously thinking T had stolen some goods, had her arrested, his master was held liable for the tort.[2]

§ 70. **Unauthorized torts committed in the course of the servant's employment and in intended furtherance of the master's business.** Even if the act is not authorized, still if the servant did it in the course of his employment and in intended furtherance of the master's business, the master is liable. But the servant must be acting in the work for which the master hired him. If a gardener without authority takes his master's chauffeur's place, and through his incompetence a third party is injured, the master is not liable. The act was not done in the course of the work for which the gardener was employed. And the act must be with an eye to the master's business. If its sole object is the benefit of the servant himself, then (with one ex-

[1] Moir v. Hopkins, 16 Ill. 313.
[2] Staples v. Schmidt, 18 R. I. 224.

ception, to be noted later) the master is not liable. Thus if S, M's delivery driver, while he is using the horses to take home a personal friend of his own, injures T, M is not liable.[3] S was not acting with an eye to his master's business, even though engaged in the work for which he was hired. But if both these tests concur—if the act was done in the course of the servant's employment and with an eye to the master's benefit—however negligently done or however mistakenly as to the ultimate benefit to the master, the master is liable. So where a servant employed at general farm labor, in driving out some cows which had strayed into his master's grain field, struck one with a heavy stone and killed it, the master was liable for the damage done to T's property. The act of driving the cows out was done with the intention of benefiting the servant's master, and it was such an act as the servant was hired for, though the means chosen were badly adapted to the end sought.[4] Negligence, carelessness, and even stupidity, in pursuing the course of the servant's employment, and for the master's ends, are not sufficient to remove the act from among those making the master liable. The possibility that acts done through a representative may be done unskilfully or negligently is an obvious one, and the risk that third parties will be injured thereby is placed by the law on the master.

§ 71. **Same: Wilful acts.** Even where the servant wilfully injures a third party, the same question arises: Was he acting in the scope of his employment? If he is not acting in his capacity as servant—as where a street car motorman, who had been insulted by a drunken passenger, left his car when the latter got off and struck him with the controller lever—the master is not liable.[5] So if the gardener in the case supposed above takes the auto, though forbidden to do so, with an eye to catching a train on which his master is coming, his intent to benefit the master will not make the master liable to a person injured by

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[3] Mitchell v. Crassweller, 13 C. B. 237.

[4] Evans v. Davidson, 53 Md. 245.

[5] Palmer v. Electric Co., 131 N. C. 250. See Limpus v. Omnibus Co., 1 H. & C. 526.

the gardener's incompetent driving. On the other hand, if the chauffeur, though forbidden to run faster than forty miles an hour, thinks to catch his master's train by going fifty miles an hour, his wilful disobedience will not free the master from liability. In Garretsen v. Duenckel,[6] M was the keeper of a gun store. He had forbidden S, his clerk, to load weapons in the store. On the occasion of the injury to T, S was showing a rifle to a customer who requested to have it loaded in order that he might see how it worked, and refused to buy otherwise. S at first declined, stating that it was against his orders. But for the purpose of making the sale he finally did load the gun, and while he was doing so it went off and shot T, who was standing on the opposite side of the street. The court in an excellent opinion said: "The servant here was unquestionably aiming to execute the order of his principal or master. He was acting within the scope of his authority and engaged in the furtherance of his master's business. There is no pretense that he was trying to do anything for himself. He was acting in pursuance of authority and trying to sell a gun, to make a bargain for his master, and in his eagerness to subserve his master's interest he acted injudiciously and negligently. It makes no difference that he disobeyed instructions. Innocent third parties who are injured by his acts cannot be affected thereby."

**§ 72. Same (continued).** Even if an agent's purpose is partly selfish, if at the same time he retains some, however little, intent of serving his master's interest and also acts in the course of his employment, the master is liable. In Phelon v. Stiles[7] S was sent by his master, M, to deliver twenty bags of flour to X and six bags to Y. When on his way to X's he came to the road branching off to Y's, he unloaded Y's flour and left it piled by the roadside. The pile frightened T's horse so that T was injured and sued M. M showed that S had piled the bags so as to get through his task more quickly, that he might catch a train for a journey of his own. But M was held liable. The business S was on, was M's business, and though S acted negli-

[6] Garretsen v. Duenckel, 50 Mo. 104.
[7] Phelon v. Stiles 43 Conn 426

gently, induced by his own ends, still the act done did not become S's business merely because he dispatched it more quickly on account of a purpose of his own. In general, then, the wilfulness of the servant's act is immaterial if it is done in the course of the servant's employment, and with any idea of benefiting the master. Disobedience and recklessness, just as negligence, are risks which the master must assume so far as third parties are concerned.

**§ 73. Same: Fraud.** This doctrine applies in the case of an agent's fraud. If the fraud is committed for the principal's benefit, the principal is liable.

**§ 74. Special liability of the master in cases of contract with a third party.** In certain cases, by exception, a master is liable for acts of his servant done in the course of his employment, even when not done with an eye to the master's interest, but solely for the servant's own ends. This is because of the existence of some special duty imposed on the master by law. An example is the duty of care of passengers imposed by law as an incident of the contract of a common carrier with passengers on its road. The principal is responsible for the duty, and if he delegate it to an agent, and the agent fail to perform it, it is immaterial whether the failure be accidental or wilful, in the negligence or in the malice of the agent; the contract of the principal is equally broken in the negligent disregard, or the malicious violation, of the duty by the agent.[8]

**§ 75. Same: Where the master has entrusted a dangerous instrumentality to the servant.** Again, the nature of the task entrusted to the servant may be such that the master is liable beyond the limits of the ordinary rule. Thus if he has entrusted a dangerous instrumentality to the servant he is liable for any use the servant makes of it, however far removed any idea of benefiting the master was from the servant's mind. Thus in Texas Ry. Co. v. Scoville,[9] T was riding on horseback along a road which paralleled the railway track when the engineer and fireman of a passenger train with deliberate intention of amus-

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[8] Craker v. C. & N. W. Ry. Co., 36 Wis. 657, 659.

[9] Texas & P. Ry. Co. v. Scoville, 62 Fed. Rep. 730.

ing themselves by frightening the horse, and with no legitimate purpose whatever, blew the locomotive whistle until T was seriously injured by his plunging animal. It was held that the railway company was liable, despite the fact that the servants, though acting in the course of their employment, clearly acted in complete disregard of the master's interests, and solely for their own purposes. It is to be observed that the master must have entrusted the dangerous instrumentality to the servant. If a servant takes possession and uses it without authority the master is not liable.[10] Just what is included within dangerous instrumentalities is not yet clearly settled by any weight of authority. In a case which held a railway bicycle to be such an instrumentality, the test laid down was "whether the appliance the control and custody of which he committed to his servant's judgment and discretion was dangerous in itself or liable to inflict serious injuries to others when operated in the customary method of use, and while being devoted to the purpose for which it was designed." [11]

§ 76. **Same: Application of doctrine to frauds of agent.** A principal is liable for frauds committed by his agent, even if not for the principal's benefit but solely for the agent's, in all cases where the fraud is made easy of accomplishment because the powers entrusted to the agent are of a sort likely to deceive third parties. For example, the freight agent of a railway company in charge of the company's station, with all its stationery, bill heads and forms, issued a bill of lading for sixty barrels of beans to one W, to be forwarded to one C. The agent had never received any goods from W, and the bill was the result of a conspiracy between W and the agent, by which W might defraud any one who would advance him money on the bill. W drew a draft on C and procured money on it from T, by transferring to him the bill of lading as security. It was held that the railway company was liable to T for the fraud of its agent, to whom it had entrusted its bills, books, and other indicia of a power to bind the company.[12] Similar decisions have held a corporation

[10] Sullivan v. L. & N. Ry., 115 Ky. 447.
[11] Barmore v. Vicksburg Ry. Co., 85 Miss. 426
[12] Bank of Batavia v. Ry., 106 N. Y. 195.

liable for losses resulting from fraudulent share certificates issued by its accredited transfer and certificate clerk,[13] and a telegraph company for a fraudulent telegram for money issued by its agent authorized to accept and transmit telegrams.[14] This exceptional holding of the principal liable, where the act of the agent is not for the principal's benefit but is made possible by the principal's having entrusted to the agent a power peculiarly liable to a misuse of a sort dangerous to the business community, has not met with universal approval. Fraud, to make the principal liable, must be for his benefit, in England and in some courts of the United States.[15]

§ 77. **Exception in case of public agencies.** The doctrines of the principal's liability for the torts of his agents do not apply to public agencies—the state, municipal corporations in their governmental capacity, and public officers generally. Obvious reasons of public policy explain this exception. So also a public charity is, by the weight of American authority, held not to be responsible for the torts of its servants, though it is responsible if it does not use due care to provide proper facilities for the performance of its public duties. Thus a charitable hospital is not liable for injury to a patient from negligent treatment given him by the physicians and nurses it employed, when it had exercised due care in their selection.[16]

§ 78. **Master not liable for acts of independent contractor.** To fix liability on a principal for the torts of one who is executing his will, it is necessary to show that the wrongdoer is in fact the principal's agent or servant. If I procure a contractor to build a house for me according to plans and specifications I furnish him, I am not ordinarily liable for his torts or those of his servants, for the contractor is not my servant. He is not under my direction or control as to the details of his work. His contract binds him to present me with a finished product. Except so far as stipulated in the contract, I retain no power to direct or control his methods of achieving the prescribed result he has

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[13] N. Y. N. H. & H. Ry. v. Schuyler, 34 N. Y. 30.

[14] Bank of Palo Alto v. Pacific Cable Co., 103 Fed. Rep. 841.

[15] Friedlander v. Texas P. Ry. Co., 130 U. S. 416.

[16] Hearn v. Waterbury Hospital, 66 Conn. 98.

contracted to furnish me—the completed building. The difference between the servant and the independent contractor lies in the power the master has to direct and control the details or the servant's work.[17] It is immaterial whether he does in fact exercise this power; so long as the relation created permits him to do so the representative is his servant. The master is not liable for the acts of an independent contractor unless he is under statutory or contractual liability to insure the safe execution of the work,[18] or unless the act itself contracted for is wrongful, in which case he is practically a joint wrongdoer with the contractor who carries out his will.[19]

**§ 79. Master not liable for torts of servant temporarily transferred to another master.** If M lends or leases to N the services of S, a servant whom M hires, and during the course of S's work for N, S injures T, M's liability depends on the nature of the arrangement between him and N as to who shall have control of S while he is working at N's work. If S is to obey N's directions as to how the work is to be performed, and in general to be controlled as to his conduct by N, then N is responsible for any tort which would make a master liable.[20] But if the arrangement is such that M is an independent contractor, sending his servant S to carry out his contract, and N's power to direct S is confined to showing him the work to be done, then M is still responsible for S's torts.[21] If, finally, M retains control as to some acts and N as to others, the master as to the act in the course of which the tort was committed will be liable. Thus M, a general contractor, leased a number of teams with their drivers to the city of Q for work on a street Q was paving. M's drivers had as one of their duties to attend to the shoeing of their teams. S let the shoes on his team get loose, and a horse kicked a shoe through T's window. T was allowed a recovery against M, in

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[17] See Lawrence v. Shipman, 39 Conn. 586.
[18] Smith v. Milwaukee Exchange, 91 Wis. 360.
[19] Ellis v. Sheffield Co., 2 E. & B. 767.
[20] Rourke v. Colliery Co., 2 C. P. D. 205. See § 56.
[21] Wood v. Cobb, 13 Allen 58.

whose service S had been negligent.[22] Had S dumped a load of stone into T's window Q would have been liable.

§ 80. **Master not liable for torts of an interloper.** We have seen that the master may be made liable by the tort of one who without his request but with his assent, express or implied, engages in his service. But if for his own ends or those of a third party, and without the master's authorization, he undertakes to render him service, he is a mere interloper and his acts impose no liability on the master.[23]

## Section 8. Principal's Responsibility for Crimes of Agent.

§ 81. **Civil liability.** As crimes are also private wrongs, the civil liability of a principal for the crimes of his agent or servant is governed by the rules laid down for tort liability. In addition to the torts at common law, for which the master is liable in damages, statutes have enlarged the field of tort liability and affixed penalties, recoverable by the party injured, to these statutory torts. In such a case the penalty is recoverable from the master, if the wrong done by the servant is within the rule making the master liable in tort. Thus where a Wisconsin statute prohibited a denial to citizens of equal rights to the accommodations of public restaurants under penalty of fine, a restaurant keeper was fined for a refusal by his waiters to serve a colored man.[1]

§ 82. **Criminal liability: In general liable only for authorized acts.** To hold a principal responsible for the torts of his agent is quite different from holding him morally guilty. Responsibility is consistent with entire ignorance and innocence of the agent's act or vigorous disapproval of it. But in criminal liability a particular state of mind is generally an essential element. Hence a principal is not criminally liable for the acts of his agent unless he can be shown either to have authorized them, assented to them, or been so negligent in controlling his agent that the act may be said to result from his criminal negligence.

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[22] Huff v. Ford, 126 Mass. 24.

[23] See Haluptzok v. G. N. R., 55 Minn. 446.

[1] Bryan v. Adler, 97 Wis. 124.

§ 83. **Same: Exceptions.** There are, however, certain statutory crimes which form an exception to this general rule. As the court said in the case of People v. Roby:[2] "As a rule there can be no crime without a criminal intent, but this is by no means a universal rule. . . . Many statutes which are in their nature police regulations . . . . . impose criminal penalties irrespective of any intent to violate them, the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible." This case was one in which a clerk of the owner opened a saloon on Sunday and sold a drink, thus violating a Sunday closing statute. The court interpreted the statute as making it the principal's duty to see that the prohibited acts were not committed, whether by the principal himself or by any of his agents or servants. The statutes most frequently interpreted thus are regulations under the so-called "police power," as the sale of foods and liquors, Sunday observance, etc.

## Section 9. Principal's Responsibility for Contracts Made on His Behalf by Agent.

§ 84. **Division of subject.** The characteristic function of an agent is to make contracts for his principal. In most cases in making these contracts he discloses who his principal is, but circumstances not infrequently arise where business reasons make a contrary practice desirable. The legal difference between contracts for a disclosed and those made for an undisclosed principal suggest a separate treatment of the two.

§ 85. **General rule.** A principal is bound to third parties by any contract made by his agent within the scope of the agent's authority. He is not bound by any contract made outside the agent's authority, and the duty of ascertaining the extent and limits of the authority is laid strictly on the third party who deals with the agent.

§ 86. **Extent of agent's authority.** The agent's authority to bind his principal by a contract includes: (1) authority actually conferred on him by his principal's instructions, either explicitly

[2] 52 Mich. 577.

or by necessary implication; (2) authority incidental to agencies of the sort to which the agent is appointed, and under the circumstances of his appointment and his field and method of operation; (3) authority apparently conferred by the conduct of the principal.

Within the authority which the principal has expressly conferred on the agent, any act of the agent is in legal effect the act of the principal.

§ 87. **Forms of conferring express authority and their construction.** The express authority may be conferred in a variety of forms, from the formal instrument under seal, the power of attorney, through instruments not under seal of varying degrees of explicitness, contracts of agency, mere notifications of appointment, and so forth, to a mere oral direction. In ascertaining the extent of the authority conferred by these different methods, the courts construe the more formal more strictly against extended powers. The third party, in determining the extent to which he is justified in relying on the agent's authority, is held to a careful examination of the formal power and a reasonable interpretation of any general language in it. An explicit definition of the extent of the agent's authority in writing is the best safe-guard of the principal from liability on contracts made by the agent.

§ 88. **Incidental authority: In general.** In addition to the actual authority conferred by the principal's instructions, the agent in his dealings with third parties who do not know the content of these instructions is clothed with incidental authority arising out of the nature and circumstances of the agency. For instance, when a man engages the services of a factor he is bound, so far as third parties are concerned, by the factor's exercise of any of the powers which business custom has conferred on agents in this occupation. Thus a factor whom the principal has authorized to sell flour on commission may, without further authorization, warrant that the flour is sound and not musty; for it is a valid business custom for factors to sell flour on such a warranty.[1] Even if the principal had expressly forbidden the

[1] Randall v. Kehler, 60 Me. 37.

factor to make this warranty, if the factor in disobedience to his instructions actually does make it, the principal is still bound to the party to whom the warranty was made, unless such party actually knew of the contrary instruction. It is a custom of the business world, and one which long ago received legal sanction, that a commission merchant may make usual warranties of quality concerning goods entrusted to him for sale, and no instruction given him by his principal unknown to the third party who deals with him, will free the principal from the burden of this authority, conferred as a usual incident of an appointment to act as factor. So a commercial traveller for a Chicago house, carrying trunks of samples in the rural districts of Wisconsin, had, as an incident of the business he was employed for, authority to contract livery bills on the credit of his house.[2] So also where a London merchant made in Liverpool a contract with a Liverpool broker, the usage of the Liverpool market was held to govern the broker's authority.

The principal cannot by instructions to the agent, of which the third party who contracts with the agent is ignorant, limit the authority the agent has as incident to the nature of his agency.

§ 89. **Same: Agents to sell.** An agent to sell property of any kind must sell for a money consideration, and cannot without special authorization bind his principal by taking in payment notes or other commercial paper.[3] He cannot make exchange for other property. He cannot transfer to pay or secure the principal's debts or his own debts.[4] An agent to sell real estate must usually be appointed in writing, in many jurisdictions by a power of attorney under seal, and his authority, as is usual in the case of written appointments, is strictly construed; so he must sell on the terms his principal directs, and a sale on others, even if better for the principal, will not bind him.[5] But his power to sell gives him power to execute conveyances, and in the majority of American jurisdictions to make a covenant of

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[2] Bentley v. Doggett, 51 Wis. 224.
[3] Buckwalter v. Craig, 55 Mo. 71.
[4] Stewart v. Woodward, 50 Vt. 78.
[5] Dayton v. Buford, 18 Minn. 111.

general warranty.[6] An agent to sell personalty may usually make warranties of the quality of the goods, and may receive payment if he has possession of the goods, but may not if he sells for future delivery. So in general a travelling salesman selling goods by sample, or merely soliciting orders, has no incidental authority to receive payment therefor.[7]

**§ 90. Same: Agents to purchase.** An agent to purchase, unless some special trade or local custom warrants it, may not purchase on credit if he is furnished with funds.[8] If he is not given funds but yet ordered to buy, he may buy on credit,[9] but usually cannot bind his principal by a promissory note. He must observe his instructions as to the quantity and kind of goods he buys, and if so directed by his master must buy from a person selected by the master.[10] He has incidental authority to fix the terms of the transaction,[11] and may arrange for shipment and delivery of the goods.

**§ 91. Same: Agents to manage a business or property.** A managing agent has the powers necessary to the efficient control of the business, that is, power to do all that is ordinarily done in the operation of a business of this particular sort.[12] But he has not power to change the nature of the business or dispose of it; and his power to make negotiable paper and to borrow money is very narrowly limited.[13]

**§ 92. Same: Factors.** Any full consideration of the various agency occupations is beyond the scope of this work, but a brief enumeration of some of the main distinguishing powers of the principal forms may be made. A factor or commission merchant is a professional agent whose business is the selling of goods on commission. It is a business with a large body of attached business custom which gives a factor large incidental powers. He has possession of the goods he deals with, and sells in his own

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[6] LeRoy v. Beard, 8 How. 451.
[7] Butler v. Dorman, 68 Mo. 298.
[8] Wheeler v. McGuire, 86 Ala. 398.
[9] Brittan v. Westall, 137 N. C. 30.
[10] Peckham v. Lyon, 4 McLean 45.
[11] Owen v. Brockschmidt, 54 Mo. 285.
[12] Edmunds v. Bushell, L. R. 1 Q. B. 97.
[13] Temple v. Pomroy, 4 Gray 128.

name, so that innocent purchasers from him are in no position to know whose goods he is selling or what instructions he has from their owner. Hence for the protection of his customers the factor has been allowed by law, both common and statutory, large authority to bind his principal to third parties by his contracts. He may sell in his own name, either for cash or credit;[14] may receive payment in cash or negotiable paper;[15] and may fix the terms of his sale as to time and prices.[16] But at common law he has power only to sell; he cannot, except where he has made advances on the goods, either barter or pledge them.[17] This is likely to prove a hardship on persons dealing with factors, especially as the latter are not infrequently dealers on their own account as well as for others. They may have in their possession goods partly those of others and partly their own, all salable in their own name and on their own terms. Their own goods they can barter or pledge for their debts. An innocent third party dealing with them may get goods which they profess to own but which are in reality goods of a principal consigned to the factor for sale. For the protection of people thus dealing with factors a number of states have passed factors' acts, with provisions designed to prevent frauds on innocent purchasers. Thus the New York act, the earliest American statute, provides: "Every factor or other agent entrusted with the possession of any bill of lading, custom-house permit, or warehouse-keeper's receipt for the delivery of any such merchandise, and every factor or agent not having the documentary evidence of title who shall be entrusted with the possession of any merchandise for the purpose of sale, or as security for any advances to be made or obtained thereon, shall be deemed to be the true owner thereof, so far as to give validity to any contract made by any such agent with any other person, for the sale or disposition of the whole or any part of such merchandise, for any money advanced, or negotiable obligation in writing given by such other person upon the faith thereof." The party taking the goods is not made the owner,

[14] Goodenow v. Tyler, 7 Mass. 36.
[15] Pickering v. Busk, 15 East 38.
[16] Smart v. Sandars, 3 C. B. 380.
[17] Warner v. Martin, 11 How. 209.

but the true owner, in order to reclaim, must repay any advances the third party has made on the goods. See Sales, Chapter V, § 63.

**§ 92a. Same: Brokers.** A broker is an agent whose business is the negotiating, usually for others and upon a commission, of purchases or sales of goods--real property, stocks, commercial paper, and other merchantable commodities. Strictly speaking, the word broker is applicable only to middlemen who bring together the principals for a contemplated transaction and have nothing further to do with the contract itself. A broker as distinguished from a factor does not normally have possession of the articles he deals in. For these reasons his incidental authority is much more restricted than that of a factor. In the case, however, of brokers dealing in shares on a stock exchange, the customs of the exchange may very greatly enlarge the usual broker's authority. Each exchange has its own rules, and, as we have seen, a principal acting through a broker in a given market is bound by any custom of that market that is reasonably consistent with the existence of an agency relation. It is immaterial in such a case that the principal did not know of it.[18] Brokers in general, in contracting for a principal with third parties, have power incidental to their business to fix terms and prices.[19] But they cannot receive payment, nor in the absence of a special custom or express authority make a warranty as to the subject matter they deal in, give credit to a buyer, or act through a substitute.[20] They must act in the name of their principal.

**§ 93. Same: Auctioneers.** An auctioneer is a professional agent whose business it is to sell at public sale to the highest bidder. He has incidental power to prescribe the terms and conditions of sale.[21] He can receive the purchase price of personal property which he has been given authority to sell, but if he sells real property he is not entitled to receive the price unless the published terms of sale prescribe that a payment, for example a deposit, is to be made at the time of sale. This he has a right

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[18] Van Dusen Co. v. Jungeblut, 75 Minn. 298.
[19] Daylight Burner Co. v. Odlin, 51 N. H. 56.
[20] Higgins v. Moore, 34 N. Y. 417; Dodd v. Farlow, 11 Allen 426.
[21] Busk v. Cole, 28 N. Y. 261.

to receive. Without special authority he cannot sell on credit, nor at a private sale, nor with warranties which will bind the principal, nor through a substitute.[22] He cannot make any binding representations as to the subject matter of his agency which vary the advertised description,[23] but he may make such as are merely explanatory of it.

**§ 94. Authority by estoppel.** If a principal so conducts himself as to lead a third party to believe that the agent is his agent, the principal will be held to the same liability on a contract made by the third party with the agent, in bona fide reliance on the principal's conduct, as if the agent were actually the principal's agent. Thus in the early case of Hazard v. Treadwell,[24] P was an ironmonger who sent A, a waterman, to T to buy iron on credit, and paid for it afterwards. He sent A a second time with ready money, and T gave A the iron as before, but A did not pay over the money. When T attempted to collect from P, P denied that A had authority to buy on credit. T sued P and was allowed to recover, on the ground that P's conduct in sending A the first time with authority to buy on credit, and then sending him a second time without notice to T that A's authority was this time less, made P liable on the second contract.

**§ 95. Limits of principal's liability.** Not every contract made by the professed agent of a principal, however, makes the principal liable. Third parties can hold the principal only where the agent had authority, or where the principal's conduct, reasonably and honestly interpreted, misled them into dealing with a professing agent as if he had authority. In every case, the third parties who deal with an agent instead of directly with a principal do so at their own risk of being mistaken as to the agent's powers. The law imposes on them the duty of making proper and diligent inquiry as to the actual existence and extent of the agent's authority, and they have no right to rely on any statements the agent himself makes about it. In the case of Martin v. Great Falls Manufacturing Co.,[25] A was an under

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[22] Williams v. Millington, 1 H. Bl. 81; Blood v. French, 9 Gray, 197.

[23] Poree v. Bonneval, 7 La. 386.

[24] Hazard v. Treadwell, 1 Str. 560.

[25] Martin v. Great Falls Mfg. Co., 9 N. H. 51.

bookkeeper in the cotton factory of the P Company, which employed also a head bookkeeper and a general manager. A came to T, who knew his position in the P Company's staff, and represented that he wished to borrow $150 for the company, which, he said, had some settlements to make. T gave him the money, and received in return a memorandum as follows: "Borrowed of T for Co. $150. A." A absconded with the money, and T sued the company for the payment. It was held that T could not recover from the company on the memorandum; he had no right to rely on A's representation as to his authority, and A's position with the company did not clothe him with incidental authority to borrow for it.

**§ 96. Exception to the rule of principal's liability.** Two exceptions are to be noticed to the limits of the principal's liability for contracts made by his agents. If the principal entrusts negotiable paper to his agent he is bound by the agent's dealing concerning it with purchasers in good faith or pledgees for valuable consideration and without notice. This is due to the legal rules governing negotiable paper.[26] In the second place, in the jurisdictions under factors' acts, the same rule of liability obtains where a principal has entrusted goods to a factor. See § 92, above.

**§ 97. Contracts made by agent on behalf of an undisclosed principal.** As has already been remarked, circumstances not infrequently arise which make it desirable or convenient for business reasons that an agent deal with third parties in his own name rather than his principal's, and without disclosing the fact that he is acting for a principal. For instance, if a manufacturing company is seeking to acquire a considerable tract of land for a factory site it will obviously be expedient for the company to buy the lots from the individual owners in its agent's name, rather than its own. Factors generally deal in their own name, and the practice is not uncommon in many sorts of agency. The agent may disclose the fact that he has a principal but conceal the principal's identity, or he may keep undisclosed the existence as well as the identity of the principal.

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[26] See Chapter XI, §§ 1-5.

**§ 98. Liability of undisclosed principal for contracts made by his agent.** It is obvious that in cases where even the principal's existence is not known to the third party the contract is made between the third party and the agent, while the third party relies solely on the credit, character, and substance of the agent. But the agent has not acted on his own initiative. The primary responsibility for the transaction is with the principal, and the contract is after all with the principal, "who set the whole thing in motion." Therefore in general, if the third party discovers that the contract was made by the agent on behalf of a principal, he can hold that principal liable on the contract. Thus in the case of Kayton v. Barnett,[27] A, who was secretly acting for P, sought to buy a certain patent right from T. T was very unwilling to sell the right to P, and suspecting that A was acting for P he inquired as to this, and was told by A that he was buying for himself and not for P. T then sold the patent to A, who paid for it in part but died before completing the payments. When T discovered that A had been acting for P he brought suit against P for the balance due under the contract, and was allowed to recover. The main ground for the decision was that P had directed every step in the negotiations carried on by A. A was merely P's agent, his mind in the transaction being P's mind, so that the court found an actual meeting of minds such that the contract was really P's and T's. In this particular case P actually got the benefit of the agent's purchase, but that fact is really immaterial. If the agent puts the proceeds of a transaction with the third party in his pocket, the third party when he discovers the principal may recover from him on the contract, even though the agent had defrauded the principal of the benefit he sought. The principal has been the originating cause of the contract being made, and so of the third party's legal detriment. The liability of the undisclosed principal to third parties is exactly the same as that of the disclosed principal. He is liable for all acts of his agent within the scope of the agent's authority express and incidental. Even though the agent was expressly prohibited from making the particular contract under

[27] 116 N. Y. 625.

which a third party, who did not know of the prohibition, sues, if such a contract was within the incidental powers of such an agent the undisclosed principal will be liable on it. Thus in the leading case of Watteau v. Fenwick[28] A was the nominal proprietor of a saloon in reality owned by P. P was a brewer who had forbidden A to get his stock anywhere but of him. The prohibition included direct purchases of cigars and other usual bar side-lines. A, in disobedience to these instructions, bought cigars from T, and also some goods not customarily handled in saloons. T, when he discovered who the real principal was, brought suit against P for the price of all the goods. He was allowed to recover the price of the cigars, but not of the other articles. The purchase of the cigars was within the incidental authority which P gave his agent when he allowed him to run a saloon business for him, even though he had forbidden A to exercise this part of his authority. But the purchase of the other articles was not within his incidental authority, and so T had no right to seek a remedy against the principal. Of course T had a right of action against A himself for these as well as the cigars; and he could not complain that he had no right against anyone else, since he had sold the goods to A in sole reliance on A's character, credit and substance.

§ 99. **Exceptions to liability of undisclosed principal: Written contracts.** The doctrine of the undisclosed principal is subject to several exceptions. An undisclosed principal is not liable on a contract under seal made in the agent's name. This is on account of the technical rule of the common law with regard to instruments under seal, that only the parties named in the instrument can be sued on it.[29] For a similar reason, originating in the law merchant, an undisclosed principal cannot be sued on a negotiable instrument where only his agent's name appears; but the third party in this case may sue the principal on the original consideration, disregarding the negotiable instrument.[30] As to written contracts other than instruments under seal and negotiable instruments, the rule of the principal's liability applies

[28] Watteau v. Fenwick, (1893) 1 Q. B. 346.
[29] Briggs v. Partridge, 64 N. Y. 357.
[30] Pentz v. Stanton, 10 Wend. 271.

even where the agent's name is the only one to appear in the writing.[31] The parol evidence rule is held not to be violated by adding the liability of the undisclosed principal to the liability of the party whose name already appears on the contract—the agent.[32]

**§ 100. Same: State of accounts between principal and agent.** Another exception to the rule of the undisclosed principal's liability, but one the exact limits of which are in some dispute, depends on the state of accounts between the principal and the agent at the time the third party makes his claim against the principal. In England in an early case on the subject, the facts were these: T sold goods to A, who bought for P, but without disclosing that fact. In due time P gave A the money to pay T, but A did not turn it over to T. T, having discovered P's relation to the contract, sued him on it; and the case turned on whether P's bona fide payment to A for T was a defense for him. It was held not to be, the court saying that P was bound not merely to pay his account to his agent but to see that the agent whom he had appointed, and for whom he was therefore responsible, discharged the obligation to T which the principal had incurred through the contract of the agent.[33] But, as the court suggested in the case, if T by his actions had induced P to pay the money over to A in the bona fide belief that such an act would satisfy T, then T would be estopped to claim from P. Thus if T should say to P, "I expect you to have the money in A's hands by August 1, to meet the debt I have against you, on the contract I made with him," a subsequent bona fide payment over to A would discharge P's obligation to T. The general American doctrine seems to be that even if the undisclosed principal's payment to his agent is not induced by the conduct of the third party, the fact that he has in good faith put the money into the hands of the agent before he became known as principal, so that A was at the time still the party on whom T was relying, will be a sufficient defense against a subsequent suit by T.[34]

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[31] Lerned v. Johns, 9 Allen 419.
[32] Higgins v. Senior, 8 M. & W. 834.
[33] Heald v. Kenworthy, 10 Exch. 739.
[34] Laing v. Butler, 37 Hun. 144.

§ 101. **Same: Third party's election.** The third party has of course a right of action against the agent with whom he contracted and on whose credit he relied. He has also, as we have seen, a right against the principal, who was the prime cause of the agent's contract. But he has not a right against both. If, after discovering that the agent was merely an agent, and learning who the principal was, the third party decides to hold the agent, he cannot, after once unequivocally signifying his intention of looking to the agent for payment, subsequently make a claim against the principal. Thus where brokers who had been instructed by A to sell short certain stocks did so, and, though they were next day told by A that he was acting for P, proceeded thereafter to sue A and garnish a debt due to him, it was held that having elected to hold A, they could not later bring suit against P.[35] It is to be noted that the election must be made after full knowledge of all the facts, so that if the brokers' suit had been brought against A before they knew that he was acting for P, they could still have sued P.[36] When the third party has decisively elected to hold the agent is a question of evidence. It has been held that proving a claim against him in bankruptcy is not an election, nor is taking his promissory note. Even bringing an action is not conclusive evidence, but the better opinion seems to be that the pursuit of an action against the agent to judgment, whether the judgment is satisfied or not, bars a subsequent suit against the principal.[37]

## Section 10. Principal's Responsibility for Statements and Knowledge of Agent.

§ 102. **In general.** The principal may be responsible not only for his agent's acts but also for his words. Whatever statements, admissions, or representations, are appropriate accompaniments of the act the agent is authorized to do, are included in the authority given him, and the principal is bound by them.

§ 103. **Agent's statements as a part of the transaction.** If

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[35] Barrell v. Newby, 127 Fed. Rep. 656.

[36] Steele Smith Co. v. Potthast, 109 Ia. 413.

[37] Cobb v. Knapp, 71 N. Y. 348; Bingsley v. Davis, 104 Mass. 178.

the agent has been shown to have authority to act as agent in a given transaction, then the statements, representations, and admissions made by him while acting in the transaction, and tending to characterize and explain it, or to form an appropriate accompaniment of it—in a word, constituting a part of the act authorized—will be binding on his principal. So when an agent negotiated a sale of coal by Pool measure, and the coal when delivered was short in weight, the agent's statement was admissible in an action against the principal.[1] It was made as a part of the transaction and during its carrying out.

§ 104. **Notice to the agent is notice to the principal.** As we have seen, one of the agent's duties to the principal is that of communicating to the principal all material facts relative to the transaction in which he is employed. (See § 62, above.) If, then, P appoints A to represent him, A is his representative to receive and ascertain all these facts, and A's knowledge of them will be imputed to P. If T tells A a material fact as to the contract in process of being made between him and A, for P, he may presume that this fact is duly imparted to P, and if A learns it in any other way the same presumption is made. Thus where A, the renting agent for P, learned in the course of collecting his rents that P's premises were being employed as a gambling house, this knowledge was attributed to P, so that he could not recover the rent on the building used for an illegal purpose.[2] This rule has frequent applications in cases where an agent knows that the principal's premises are unsafe or his machinery defective. Proof that the agent in charge of these matters knew of the defects will show that the principal is responsible to persons injured thereby.[3]

§ 105. **Same: Limitations of rule.** Notice to the agent to be binding on the principal, must be notice given when the agent is acting in the scope of his authority, and must relate to the business in which the particular agent is engaged.

§ 106. **Notice must be received in the course of the agency.** If the information has been acquired before the agency began,

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[1] Peto v. Hague, 5 Esp. 134.

[2] Ryan v. Potwin, 62 Ill. App. 134.

[3] Denver v. Sherret, 88 Fed. Rep. 226.

the rule of the majority of American courts is that the agent' knowledge is notice to the principal only when the agent actually had the fact in question in mind at the time of his transaction for the principal, and also when it was not such a fact as a due regard for his duty to an earlier principal would inhibit him from disclosing to the one sought to be charged. In the case of The Distilled Spirits,[4] P sought to reclaim from United States officers distilled spirits which they had seized for a violation of the revenue laws, and P claimed to have bought them through A without any knowledge of the violation. A was alleged to have known, before he became P's agent, of a fraud committed on the revenue officers. The Supreme Court laid down the rule that if the jury believed that A remembered the fraud when he bought the liquor on P's behalf, and if he could have told P, then his knowledge would be P's. The court suggested that if A's knowledge of the fraud had been acquired confidentially as attorney for a former client, such knowledge not being rightfully communicable to P could not be imputed to him. The burden of proving the agent's state of mind and his ability to disclose to his present principal is on the party alleging that the principal had notice.[5] Some courts hold absolutely that it is only during the term of the agency that notice to an agent is notice to his principal.[6]

**§ 107. Notice to an agent adversely interested is not notice to the principal.** The rule of notice is intended for the protection of third parties who should be able to presume that material facts brought to the agent with whom they are dealing in a given transaction will be communicated to the principal, or at least acted on by the agent with the principal's full permission. If, however, the fact brought to the agent's knowledge is such, or the agent's conduct is such, as to make a reasonable man understand that the agent will not communicate it to the principal—as for example where the agent is acting for himself and adversely to his principal—then notice to the agent will not bind the principal. So where A, acting in his own personal interest,

[4] The Distilled Spirits, 11 Wall. 356.
[5] Constant v. University of Rochester, 111 N. Y. 604.
[6] McCormick v. Joseph, 83 Ala. 401.

sells land to a company of which he as president was purchasing agent with authority to buy, his knowledge that the title is defective is not imputable to his principal, the company.[7]

§ 108. **Notice to agents of corporations.** The rule of notice applies to corporations as well as to natural persons, and is very important in this connection since corporations can act only through their agents. If, then, an agent of a company, acting in a transaction within the scope of his authority, obtains any knowledge material to the transaction, the knowledge is thus brought home to the company, whether the agent communicates it to the board of directors or not. Thus where a director of a bank who acted as agent for the bank, as authorized by custom, in discounting a note, knew the note to be fraudulent, the bank was charged with his knowledge. The court said that "if the note is discounted by the bank the mere fact that one director knew of the fraud or illegality will not prevent the bank from recovering. But if the director who has such knowledge acts for the bank in discounting the note, his act is the act of the bank, and the bank is affected with his knowledge."[8] It will be noted that the knowledge must be acquired by the agent in the course of his employment, and with reference to a transaction in which he himself is engaged. The usual rule as to adverse interest also applies.

§ 109. **Notice to sub-agents.** If either by custom or by express authority an agent has power to appoint sub-agents who will themselves be agents of the principal, notice to these sub-agents is notice to the principal. So insurance companies, whose general agents by custom of business appoint sub-agents to write insurance for them, are liable for the knowledge of these sub-agents. In a case where such a sub-agent, who had written a policy on T's goods, failed to disclose to his company that T was insured in another company, although he had been told so by T, the company was still held chargeable with the information given to its sub-agent, who had been appointed without knowl-

[7] Barnes v. Trenton Gas Co., 27 N. J. Eq. 33.
[8] Innerarity v. Bank, 139 Mass. 332.

edge of the board of directors by one of the company's general agents.[9]

### Section 11. Principal's Rights Against Third Parties.

**§ 110. Rights of principal against third party in tort.** If the agent has wrongfully parted with property entrusted to him by his principal, if for instance he has bartered or pledged property given him to sell, or has transferred it to a third party to pay his own debts, the principal can, with the exceptions noted below, recover it from any person who has it. It does not matter that the third party is innocent in his assumption of possession over the goods he has obtained. He is bound to ascertain the agent's right to dispose of them, and his good faith is insufficient to protect him from the claim of the rightful owner. This is true whether the third party thought the agent from whom he bought was himself the real owner or merely an agent. The principal cannot be divested of his property except by his own act or by operation of law. So where the third party had traded wines for rum with A in good faith, thinking A the owner of the rum whereas he was only an agent of P with power to sell, P recovered the value of the rum from T, because A had no authority to barter.[1] So also where a horse had been delivered to an agent for sale, and he turned it over to a third party in payment of a debt, the owner was allowed to maintain replevin for the horse even against a bona fide purchaser.[2]

**§ 111. Same: Exceptions.** If, however, the property consists of currency or negotiable instruments, and T is a bona fide purchaser without notice, or if A has in his possession documentary evidence of title in himself, or if the case falls under the operation of the factors' acts, P cannot recover either the property or damages against the innocent holder for value Title to negotiable instruments or currency passes by delivery to any bona fide purchaser for value without notice.[3] And

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[9] Goode v. Ins. Co., 92 Va. 392.
[1] Guerreiro v. Peile, 3 B. & Ald. 616.
[2] Parsons v. Webb, 8 Me. 38.
[3] Ayer v. Tilden, 15 Gray 178.

where the agent has been entrusted by the principal with documentary evidence of title in himself, the principal's conduct in so entrusting his agent with this evidence estops him from disputing the agent's right to pass a good title. So where P has allowed A to stand as registered owner of a vessel, or as the registered holder of a carter's license, he cannot recover from a third party to whom the ship or the truck has been wrongfully disposed of by the agent.[4] However, a mere possession of the goods themselves by the agent is not sufficient to estop the principal from asserting title to them in the hands of an innocent purchaser who has relied on the agent's possession, since that possession is consistent with various explanations other than ownership. A may have had the goods entrusted to him by the principal for repair, safe-keeping, or sale on commission, and a buyer from A takes them at his own risk.[5] The statutory exception in the case of transfer to innocent parties by factors has already been discussed. (See § 92, above.)

**§ 112. Rights of disclosed principal against third party in contract.** When the principal has been named by the agent as the person on whose behalf he is acting, and the agent is within his authority, either previously conferred by appointment or subsequently by ratification, the principal is the only one who can recover from the third party on the contract. In America this is true even when the principal is a resident of a foreign country.[6] Even if the agent has embodied his contract in writing and omitted the name of the principal from the written instrument, then, if the contract is not a contract under seal or a negotiable instrument, the principal can show by parol evidence that the contract was made on his behalf, and can sue the third party on it.[7] But if the contract is under seal, or a negotiable instrument, only the parties named in the writing can sue on it, and parol evidence cannot be introduced to give the principal a cause of action upon it.[8] To make these forms of contract valid

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[4] Calais Co. v. Van Pelt, 2 Black 372.

[5] See Pickering v. Busk, 15 East 38.

[6] Kirkpatrick v. Stainer, 22 Wend. 244.

[7] Bateman v. Phillips, 15 East 272.

[8] Briggs v. Partridge, 64 N. Y. 357; and see § 99, above.

for purposes of the principal's suit on them, they should be in his name, and, if sealed, under his seal, and professing to be his deed. A should sign with P's name, thus: "P by A;" although "A for P" is also recognized as a good signature if the instrument elsewhere discloses that it was intended to be P's.[9]

**§ 113. Same: Rights of undisclosed principal against third party in contract.** When an agent having authority makes a contract with a third party, but does not disclose his agency, there are two cases, which for our present inquiry must be distinguished. The agent may disclose neither the name nor the existence of his principal, or he may, while disclosing the fact that he is acting under a principal, withhold the principal's name.

**§ 114. Same: In general principal can recover.** In general the principal can disclose his relationship to the contract, and recover on it from the third party. Thus where A sold hemlock bark to T under a written contract made in A's own name and not in any way intimating that he was an agent, or that anyone else was interested in the contract, P was able to prove by parol evidence that she was the owner of the bark, and that A made the contract as her agent, and on these grounds to recover from T the contract price.[10] Since the third party has a right of action on the contract against the undisclosed principal for a breach on the principal's part, it seems just to allow the principal a similar remedy for a breach on the part of the third party.

**§ 115. Exceptions to rule: State of accounts between agent and third party.** If the third party, relying upon the agent's apparent principalship, has acquired a right of set-off against him or has in good faith paid him on the contract, the principal cannot then recover the full amount against the third party. He must allow the set-off or the payment. Thus where P had entrusted tobacco to A to sell, and A sold in his own name to T, and later T, in view of the obligation he had to meet, took from a debtor of his own a bill of exchange accepted by A, T was allowed to set this off against P's claim when sued by P on the

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[9] Mussey v. Scott, 7 Cush. 215; and see Bryson v. Lucas, 84 N. C. 680.

[10] Huntington v. Knox, 7 Cush. 371.

contract.[11] But it was necessary for T to rely on A's principalship. So if he knows that A is merely an agent, though A has disclosed only the existence and not the name of his principal, he cannot set up a counter obligation or a payment to A. He did not rely on the sole credit of A, and he must recognize P's right as the prime mover in the contract. Even if A is known to T as acting sometimes for himself and sometimes for a principal, as for instance many commission merchants do, selling goods of their own as well as on commission, T cannot then assume that A when dealing with him is contracting for himself. He is bound to inquire as to the character in which A is acting in a particular transaction, and if he fails to do so he cannot be allowed the benefit of a set-off against the undisclosed principal.[12]

**§ 116. Same: Negotiable paper and sealed instruments.** As has been already noted, the law of undisclosed principal has no application to sealed instruments and negotiable papers, and the principal gets no rights on these forms, as he has no liabilities. (See § 99, above.)

**§ 117. Same: Where agent has expressly represented himself as principal in a written instrument.** If the agent has in express terms represented himself as principal in a written instrument, the parol evidence rule will prevent the principal from showing that he is a principal in order to sue on the contract.[13] But if the agent is a real principal, though in the instrument he represented himself as the agent of an undisclosed principal, he may later sue as principal himself, since the third party, after all, relied on his credit when he made the contract.[14]

**§ 118. Same: Where personal reliance is placed in agent.** If the contract was expressly made with the agent as principal, and it can be shown, either from the written documents embodying the transaction or from the accompanying negotiations not put in writing, that a special personal trust or confidence was

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[11] George v. Clagett, 7 T. R. 359.
[12] Baxter v. Sherman, 73 Minn. 434.
[13] Humble v. Hunter, 12 Q. B. 310.
[14] Smaltz v. Avery, 16 Q. B. 655.

reposed in the agent as principal, e. g., on account of the personal nature of the services contracted for, then the principal cannot get rights on the contract. If A in his own name contracted with T to write a book for T's publishing house, P could not later show that A was acting as agent for him and recover on the contract from T. So also where A sold T a yoke of oxen for P, a man with whom T was unwilling to have any dealings, and T, finding that they were P's oxen, refused to take them, P got no rights on the contract of sale.[15]

**§ 119. Liability of the third party to the principal in equity.** In equity the principal is given a right to follow any property of his which has through his agent come into the hands of any other than a bona fide purchaser for value. Thus where an agent has deposited funds of his principal with a bank, in an account opened with "A & Co., agents," if the bank holds claims against A & Co. it cannot on the authority of A charge this account with a debt owed it by A.[16]

## Section 12. Agent's Liability to Third Party.

**§ 120. In general agent is liable for torts.** The agent or servant in serving his principal may injure third parties. He may do so in obedience to his principal's orders or through his own disobedience, carelessness, or malice. But the fact that he is in the employ of another makes absolutely no difference in his own liability to the third parties for violation of their rights. An agent is no more or less liable personally because of his agency. His duty to third parties not to injure them exists quite apart from the relation he has entered into. But he is not liable for any loss they suffer through him where he owes no duty to them.

**§ 121. Liability for performance of duty to principal injurious to third party.** If by order of his principal an agent does an act which wrongs a third party, the agent is liable as well as the principal. So where A by P's direction set fire to a prairie

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[15] Winchester v. Howard, 97 Mass. 303.

[16] Baker v. Bank, 100 N. Y. 31; and see the chapter on Trusts, Chapter X of this book.

whereby T's property was burned, A was held equally liable with P.[1] And if in the performance of a duty to the principal, which if properly performed would not injure anyone, the agent executes his commission so improperly as to injure a third party, the agent is liable. Thus where A was directed by P to put up a block and tackle in a factory, and he left his work unfinished and the block so negligently suspended that it fell on T and injured him, A was held liable. So again where A, a house agent, had the water turned on in a business block which he had charge of, without observing the necessary precaution of inspecting the taps to see that they were all shut off, he was held liable to a tenant whose stock was damaged by leakage from an open tap above his store.[2] By the better opinion the rule applies in cases where a real estate agent entrusted with the possession and control of vacant premises puts a lessee into possession when he knows or ought to know they are in such disrepair as to be dangerous. If his negligence leads to injury to the one he put in possession he is liable.[3]

**§ 122. Contracts for disclosed principal.** If A, acting under instruction from P, steps into T's shop and asks T to do some work for P, T cannot subsequently elect to hold A responsible on the contract.[4] The mere act of ordering does not make the agent liable where he tells the third party his relation to the transaction. That statement is equivalent to a declaration of intention not to be bound personally. But if at the time of making the contract T tells A that he will do the work only if A himself will be responsible and A consents, then A will be personally liable. Whether the contract has been thus made so as to bind A is a question of the intention of the parties.[5] In some occupations, however, A's intent to assume personal liability will, by the custom of the business, be presumed in the absence of an express stipulation to the contrary.[6]

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[1] Johnson v. Barber, 10 Ill. 425.

[2] Bell v. Josselyn, 3 Gray 309.

[3] Baird v. Shipman, 132 Ill. 16, but compare Van Antwerp v. Linton, 39 Hun. 417.

[4] Owen v. Gooch, 2 Esp. 567.

[5] Addison v. Gandassequi, 4 Taunt, 574.

[6] Pike v. Ongley, 18 Q. B. D. 708.

**§ 123. Written contracts not under seal.** If the contract made by the agent for a disclosed principal is put in writing, its terms usually bind the principal alone. But the agent may fail to embody his disclosure of the principal in the writing, or may in some other way make the contract in apt terms to bind himself personally. The agent is not then allowed so far to contradict the written instrument as to show by parol evidence that the intention was not to bind him. This is held despite the fact that, as we have seen, parol evidence may be introduced, when the principal's name is lacking, to bind the principal also, "for to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party, is not such, would be to allow parol evidence to contradict the written agreement, which cannot be done."[7] Even if the agent has signed his name with the affixed word "agent," or has described himself in the body of the instrument as an agent, he is not thereby relieved from liability.[8] But if, although he signs the contract with his own name, yet in the instrument he indicates that he is acting for a principal whom he names, as in the phrase, "We have this day sold to you, on account of James Morand & Co., 2,000 cases of oranges," he thereby frees himself from liability.[9]

**§ 124. Sealed and negotiable instruments.** If the instrument is under seal, only the parties named in the instrument can be charged on it. So if the agent fails to embody his principal's name in an instrument required by law to be under seal, and does put in his own name, he himself is bound,[10] and in case of a breach by the other party, the agent alone, and not his principal, can sue on it. If the writing is a negotiable instrument, the person in whose name it is executed is liable on it. So if A has executed it in his own name, he cannot introduce parol evidence to show that the intention of the third party and himself was to make the contract binding on the principal and not on the agent. Thus where an agent made a note promising to pay T £100 and

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[7] Higgins v. Senior, 8 M. & W. 834.
[8] Brown v. Bradlee, 156 Mass. 28.
[9] Gadd v. Houghton, 1 Exch. Div. 357.
[10] Taft v. Brewster, 9 Johns 334.

signed it "A, Trustee," he was not allowed to show that he entered into the contract on behalf of a building society. He had made the note in his own name, and the addition "Trustee" was immaterial when the note did not disclose any person for whom he was acting.[11]

**§ 125. Liability for unauthorized contracts.** The agent may, through innocent mistake or negligence, or with deliberate intention, make with a third party a contract, professedly by authority of the principal, which authority in fact he did not possess. In such a case if the third party entered into the contract in good faith, believing that the agent had the authority, the agent, whether he acted in good faith or not, is liable for the breach of his implied warranty that he did have authority. The amount of damages the third party is allowed in such case is the amount of loss resulting as a net and probable consequence of the breach of contract. If the misrepresentation of authority is consciously made with the intention to deceive, the injured party has a right of action in tort for wilful deceit.[12] If, however, the agent does not deceive the third party, for instance where the third party knows all the facts himself, he cannot recover against the agent. So if A in good faith puts T in possession of all the facts on which A himself relies as constituting his authority, and T, exercising his own judgment on the facts, concludes the contract with A on that basis, A is not personally liable to T.

**§ 126. Liability for contracts made on behalf of a non-existent or incompetent principal.** If an agent professes to act for a principal, he impliedly warrants the principal's competence.[13] Thus if he makes a contract for a principal who is a married woman, in jurisdictions where she has no contractual capacity, so that the third party could not recover from the principal, the third party would have a right of action against the agent. If he made a contract for an infant where an infant's appointments of agents are held voidable, and the infant disaffirms the contract, the agent will be liable; but the infant must actually disaffirm in order to give the third party a right of ac-

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[11] Price v. Taylor, 5 H. & N. 540.

[12] Noyes v. Loring, 55 Me. 408.

[13] Hoppe v. Saylor, 53 Mo. App. 4.

tion. When an agent professes to have authority from a principal who is in fact not in existence at the time, the agent becomes personally liable. This has been illustrated in the case of promoters professing to contract on behalf of a corporation not yet organized.[14] Another illustration is furnished by the common case of a contract made by an agent on behalf of an unincorporated association, which is not a legal entity. Thus where the captain of a company of volunteers professed to contract on behalf of his company for a rifle fund, he was held personally responsible, as the company was not a competent principal.[15]

**§ 127. Agent is liable on contracts for undisclosed principal.** Where an agent makes a contract for an undisclosed principal, whether the contract is oral or in writing, he is liable on the contract. So where A, who was personally well known to T, but of whose business T knew nothing, bought cattle from T in his own name but in reality for a meat market in which he was an employee, T was allowed to recover from him personally. As the court said: "It would be a monstrous principle that a person buying an article in his own name and on his own credit could screen himself from liability for payment on the ground that he had bought it under a secret understanding that he was the agent of a bankrupt." [16] Even if the agent discloses the existence but not the name of his principal, the third party makes the contract in reliance on him personally. It does not matter that after the contract is made the agent discloses his principal, or even that the third party first sues the principal. He retains his right against the agent until he has pursued a suit to final judgment.[17] If, however, at the time of the contract, the third party knows who the agent's principal is, no matter whether he got the information from the agent or from some other source, he does not rely solely on the agent's credit, and the agent is not liable.[18]

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[14] See § 12, above.

[15] Blakely v. Bennecke, 59 Mo. 193.

[16] Pierce v. Johnson, 34 Conn. 274.

[17] Cobb v. Knapp, 71 N. Y. 348.

[18] Chase v. Debolt, 7 Ill. 371.

## CHAPTER III.

### TORTS.

**§ 1. Definition of a tort.** The word "tort" has been borrowed from the French; it means literally a wrong.[1] In its legal meaning, however, the term is not used to include everything which the law treats as a wrong. For example, a crime or breach of contract is a legal wrong, but they are both to be distinguished from a tort. The most important rights protected by the law of torts are those of personal security, of property, of reputation, and of social and business relations.

No satisfactory definition of a tort has ever yet been framed. The one which is perhaps most frequently given is as follows: "A tort is a wrong arising independently of contract for which the appropriate remedy is a common law action." This, however, is too broad because it includes obligations in quasi contract. Besides, the definition merely serves in a negative way to distinguish a tort from a crime on the one side and from a breach of contract on the other.

**§ 2. Differences between intent, negligence, and accident.** If A is driving on the highway and drives over B, he may do this either intentionally, negligently, or accidentally. That is, he may desire to run over B (intent); if he does not desire it he may not use the proper amount of care not to run over him (negligence); and if he does not desire it and drives carefully it is then called an accident. Intent is thus seen to be a state of mind, negligence is a kind of behavior, while accident, as the word is often used in a legal sense, is the negation of both intent and negligence.

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[1] The French word "tort" was in turn derived from the Latin "torquere," meaning to twist or bend.

**§ 3. Intent distinguished from motive.** The difference between intent and motive is briefly this: a defendant acts intentionally when he desires a particular result, without reference to the reason for such desire. Motive, on the other hand, is the reason why the defendant desires the result. Motive is material only in certain torts, for example, defamation, malicious prosecution and malicious interference with business and social relations.

## Section 1. Trespass upon Real Property.

**§ 4. Essentials of trespass upon real property.** A trespass upon real property consists in an intentional or negligent touching of land in the possession of the plaintiff caused by a voluntary act of the defendant.

**§ 5. Meaning of "land."—Entry beneath and above the surface.** It is well settled that a trespass may be committed by an entry beneath the surface as well as upon it. For example, if A is digging beneath the surface of his own land and extends the excavation underneath the surface of B's land adjoining, it is a trespass. In Smith v. Smith [1] the eaves of the defendant's barn projected over the plaintiff's land. This was held to be a trespass. So are telegraph wires over a person's land, or the intrusion of an animal's head over a fence. Whether the passing of a balloon or airship over the land so high as not to affect its occupation constitutes a trespass seems not to be settled either in England or in this country.

**§ 6. Overhanging trees not a trespass.** The overhanging branches of trees do not constitute a trespass, but are considered to be merely a permissive nuisance.[2] The result of this is that the plaintiff may not recover without proving special damage; but on the other hand, he may disencumber his land by cutting off the branches and the roots up to the boundary line, and this right is not barred after twenty years as a right to bring an action of trespass would be. The distinction between this case and the case of the projecting eaves is perhaps due to the fact

[1] 110 Mass. 302.
[2] (1894) 3 Ch. D. 1.

that the former is due to natural growth, while the latter is wholly artificial.

**§ 7. Actual enclosure and special damage not necessary.** An actual enclosure such as a wall or fence is not necessary; it is enough if the defendant crosses the boundary even though there is nothing to show where the boundary line is. As in the law of trespass to the person, special damage need not be proved. The land which one occupies thus partakes of the inviolability of his person. Even though the defendant should benefit the land—for example, by cultivation—it is nevertheless a trespass. The chief advantage of this is that where there is a dispute as to the right of possession the point may be raised at once by litigation. Since the matter may be litigated without waiting for damage to be inflicted, the statute of limitations against the bringing of the action will begin to run at once.

**§ 8. Act of defendant need not be intentional.** In Guille v. Swan[3] the defendant went up in a balloon and unintentionally descended into the plaintiff's garden; the defendant was held liable, on the ground of negligence.

### Section 2. Trespass upon Personal Property.

**§ 9. Essentials of trespass upon personal property.** A trespass upon personal property may be effected either by removal, by taking possession, or by injury or destruction. As in the law of trespass to the person and to real property, the defendant's act must be voluntary and the force must be applied directly.

**§ 10. Removal and taking possession.** In Bruch v. Carter[4] the defendant untied the plaintiff's horse and removed him a short distance from the hitching post to which his owner had fastened him. This was held to be a trespass. Removal is not necessary however. In Miller v. Baker[5] a deputy of the defendant, a sheriff, took the possession of some nursery plants and shrubs; he neither touched the property nor attempted to remove it. The court held that the defendant was liable in trespass.

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[3] 19 Johns, 381.
[4] 3 Vroom (N. J.), 554.
[5] 1 Metc. (Mass.), 27.

**§ 11. Injury or destruction.—Mere touching not a trespass.** Where the defendant neither takes possession of the property nor removes it, he may still be liable in trespass if he injures or destroys it. A mere touching of the property, however, without causing damage, does not amount to a trespass. The common law does not protect personal property to the same extent that it does real property.

## Section 3. Mistake.

**§ 12. Mistake distinguished from accident.** As has been pointed out, accident means the negation of intent and negligence. Mistake assumes an intent to do the injurious act but an error as to its legal effect or some collateral circumstance. A carefully shoots at a mark and the ball glances from the target, killing B's dog. A did not intend to hit the animal—it is an accident. But if A saw an animal approaching and shot it, thinking it to be a wolf, and it proved to be B's dog, this is a mistake. He intended to kill the animal, but was mistaken as to its identity. The test is always: Did defendant intend the injury complained of? If he did, but thought he had a right to do it, it is a mistake. If he did not, it is accident or negligence. In the Nitro-Glycerine case,[1] the defendant express company was transporting some nitro-glycerine reasonably thinking that it was sweet oil; the nitro-glycerine exploded and damaged the plaintiff's property. Here, in popular language, there was a mistake as to the material being carried, but the injury complained of from the explosion was not intended, so it was legally a case of accident, not of mistake, and defendant was not liable.

**§ 13. Mistake of title.—Trespass upon real property.** In Basely v. Clarkson[2] the plaintiff brought trespass for breaking his close and cutting his grass and carrying it away. The defendant pleaded that his own land adjoined that of the plaintiff, and in mowing his own land he by mistake mowed down some grass upon the plaintiff's land, intending to mow only his own grass. The court held that the plea was not a good one because

[1] 15 Wall. 524.
[2] 3 Levinz. 37.

the act was voluntary (that is, intentional); that his knowledge was immaterial because it could not be shown. Though matters of knowledge are now judicially passed upon every day so that the reason given by the court no longer exists, the law is still in accordance with the decision that mistake of title is no excuse for a trespass upon real property. This is true even though the mistake were made reasonably and in good faith. In Basely v. Clarkson the defendant intended the result: that is, he intended to cut the grass which he did cut, though he probably would not have intended it if he had known that the grass belonged to another. If the scythe had slipped from the defendant's hand and accidentally gone across the boundary line and cut some grass, the defendant would not have been liable, as we have just seen in the previous sub-section.

### Section 4. Self-Defence.

**§ 14. In general.** Defending one's person, defending one's property, recovering one's property and abating nuisances are all called self-help; that is, one protects his own rights instead of appealing to the courts for redress.

**§ 15. When the right of self defence arises—Provocation.** One does not need to wait till a battery has been committed upon him before acting in defence; the right arises when a battery is attempted—that is, when one has been threatened with violence. Mere threats or other provocation such as calling one a liar or a thief give no right to use force.

**§ 16. Extent of right.** No more violence can be used than what a reasonable man would under the circumstances regard necessary to his defence. Not only must the force used in defence be in proportion to the force used or about to be used by the assailant; the force must be of a kind calculated to repel the attack. Thus if the attack is made without a weapon it would not usually justify defending one's self by using a deadly weapon and maiming the assailant.

**§ 17. Right to kill in self defence.** If human life is not imperiled, one is never under a legal obligation to retreat from an attack; he may stand his ground and oppose force to force. If

however, he can defend himself only by killing his assailant or endangering his life, he must retreat if it is reasonably safe to do so. When retreat is not reasonably safe he may kill in order to save his own life.

§ 18. **Right of defence against animals.** In the previous paragraphs we have been discussing the right to repel an attack made by a human being. Animal life being much less valuable than human life, the right to defend one's person against an attack by an animal is correspondingly greater. One may even kill though his life is not in danger and is never bound to retreat, except perhaps in case of valuable and useful animals. In Morris v. Nugent [3] the plaintiff brought trespass for shooting and killing his dog. The court held that if the dog was attacking the defendant at the time, it was a good defence even though the dog was not of a mischievous disposition; but if the dog was running away after the attack, the killing was not justified. If, however, it was reasonable to believe that the dog would immediately return for another attack, it would seem that the defendant should have the right to kill.

§ 19. **Right to defend other persons.** The same amount and kind of force that may be used in defending one's self may be used by a husband to defend his wife, by a wife to defend her husband, by a parent to defend his child and by a child to defend his parent. The right probably extends to all near family relations. A servant may defend his master. The right of a master to defend his servant has been denied on the ground that the master had a right of action in such a case. Since this reasoning is no longer considered sound, such a right on the part of the master ought now to be recognized. Whether there is any right to defend a stranger beyond that involved in the right to interfere to prevent the commission or continuance of felonies and breaches of the peace and in the right to interfere to preserve human life, is not clear. If such a right exists, much less latitude would be allowed than in self defence.

[3] 7 Carrington & Payne, 572

### Section 5. Defence of Property.

**§ 20. Right to kill in defence of property.** There is no right to take human life in defence of property except when necessary to repel an attack made upon one's dwelling house, or to prevent a felony of violence, like highway robbery. This is an extension of the right of self defence.

**§ 21. Right to use force in defence of personal property.** The right to use force to resist an attempt to carry away chattels has long been recognized. In a case decided in 1470 the justices held that "if a man will take away my goods, I may lay my hand upon him and prevent him; and if he will not desist, I may beat him rather than let him carry them off." If the other party should actively resist, it would give rise to the right of self defence which was discussed in the previous section.

**§ 22. Right to remove trespassers from real estate.** Generally the right is to push or carry off the trespasser; there is no right to strike unless there is active resistance. Where the trespasser has entered forcibly there is no need to request him to depart; but if he has entered peaceably, there must first be a request to leave before force can be properly used to effect his removal.

**§ 23. Right to kill animals to prevent destruction of property.** One of the elements to be considered in such a case is the proportion between the value of the animal killed and the value of the property about to be destroyed by it. If the disproportion is very great, the right probably does not exist:—for example, there is probably no right to kill an animal known by the defendant to be worth $500 in order to prevent the destruction of property worth a few cents.

**§ 24. Right to kill trespassing animals.** There seems to be no right at common law to kill animals merely because they are trespassing. The right to kill trespassing poultry after notice in towns and cities has been occasionally given in recent statutes and ordinances.

**§ 25. Right to remove trespassing animals.** One may remove trespassing animals, if reasonable care is taken not to unnecessarily injure them.

**§ 26. Right to remove inanimate property from land.**—

**Notice.** In Rea v. Sheward[4] the plaintiff had left some of his goods upon premises which he had leased to the defendant; the defendant thereupon removed them to the land of the plaintiff adjoining, that being a convenient place for depositing them. The court held that though the defendant might have impounded the goods he was not bound to do so, but was justified in thus returning them to the plaintiff. So, if a tenant does not remove his goods within a reasonable time after giving up possession, the landlord may remove them to a safe place. In Burgess v. Gaffam[5] the defendant had had plaintiff's house and lot sold on execution for a small debt, and having allowed the year of redemption to expire without actual notice to her, entered the house, which was vacant, and removed the plaintiff's furniture. The court held that this was not justified since the plaintiff was entitled to notice that the goods were unlawfully there and an opportunity to remove them herself. Notice is only necessary in cases where the property came upon the premises lawfully.

## Section 6. Recovery of Property.

**§ 27. Immediate or peaceful recaption.** If the loss of possession is only momentary, or if, in the case of chattels, the party makes immediate pursuit, he has the same right to use force which he had when he was defending his possession. If one recovers peaceably the possession of property to which he is entitled, he then has the right to defend his possession which was discussed in the previous section. This is true even though he obtained the possession by trick or artifice.

**§ 28. Right to use force to recover possession of chattels.** Except as above stated, no one is justified in recovering possession of chattels by force. This represents the views of many courts in this country. But in other jurisdictions, including England, one who is entitled to the possession of a chattel may commit a battery in order to recover it from anyone who has it in his actual possession and detains it, provided that such possession was wrongful in its inception; a battery could not be

[4] 2 M. & W., 424.
[5] 18 Fed. Rep., 251.

committed on a bailee or upon a vendor who refuses to deliver the chattel.

The former rule is perhaps the better, though it works a hardship where the chattel is perishable or so small as to be easily concealed and the wrongful possessor is pecuniarily irresponsible. Probably there is no right to imprison in order to get back the possession of property.

**§ 29. Right to use force to recover possession of real property.** Statutes forbidding forcible entry upon land are in force in nearly every jurisdiction. These statutes make forcible entry a criminal offense. The question to be discussed here is, whether the violation of the statute is also a tort. In some jurisdictions the statute is given no effect in the law of torts, so that a land lord or other person entitled to the possession of land is liable only to punishment by the state if he enters by force; he is not liable in tort for the entry, for using reasonable force to eject the possessors, or for removing their goods. This seems to be the present English law. In other jurisdictions the statute forbidding forcible entry is construed as making the entry unlawful for all purposes, so that one who takes forcible possession may be compelled to restore it and also be liable in trespass to the land and to the person and goods of the possessor. A third view gives a right to recover only for the trespass to the person and goods.

To compensate taking away the right of forcible entry which existed in the early common law, the statutes provide a speedy and summary remedy for getting possession in which a sheriff or constable effects the removal. On account of the danger of the jury finding that excessive force was used—especially in landlord cases—it is much wiser in any jurisdiction to take advantage of the statutory method.

**§ 30. Right to enter another's land to recover chattels.** It is clear that one may, without incurring any liability whatever, retake his property peaceably if he can find it in a public place. The right to trespass upon another's land in order to get chattels depends upon how the chattels came to be there. The right to enter, when given, is the right to enter peaceably; the right to use force to retake chattels has already been discussed.

**§ 31. Same: Goods there by defendant's fault.** If the defendant has wrongfully left or placed the chattel upon the plaintiff's land, he has no right to enter to get it; if the plaintiff will not give him permission and will not himself deliver it over, the defendant should bring an action of replevin.

**§ 32. Same: Goods there by plaintiff's fault.** In such a case the defendant would be liable only if he unnecessarily damaged the plaintiff's property in removing his own goods, and then only to the extent of such unnecessary damage.

**§ 33. Same: Goods there without fault of either defendant or plaintiff.** If the defendant's goods have been carried upon the plaintiff's land by a storm or other act of nature, the defendant has a right to enter to retake his property; he would, however, be liable for any damage caused to the plaintiff's property in the act of removal. If the defendant's goods have been taken by a third person and placed upon the plaintiff's land, the same rule ought to apply as in the case where they have been taken there by an act of nature. Such seems to be the law where the act of the third person was felonious; but where the act was not felonious, the older cases deny the right. The reasoning is that where the act of the stranger is not felonious the defendant has at once his remedy against the stranger; and having one remedy, there is no right of self-help. Such reasoning, while quite common in the early law, is no longer considered sound; it is therefore doubtful whether the old precedents on this point would be followed today.

## Section 7. Arrest without Warrant.

**§ 34. In general.** The importance of apprehending at once those who have committed serious crimes and of preventing the commission of such crimes is so great that arrests may under some circumstances be made without waiting to secure a warrant from a magistrate.

**§ 35. Arrest to prevent a felony.** Every person has the right to arrest another without a warrant in order to prevent the commission of a felony.

**§ 36. Arrest for felony.** A constable, having reasonable cause to suspect that a person has committed a felony, may de-

tain such person until he can be brought before a justice of the peace to have his conduct investigated. There is this distinction between a private individual and a constable; in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities.

§ 37. **Arrest for breach of the peace.** A breach of the peace is a criminal assault and battery, or any other misdemeanor which tends to excite and alarm the public. Officers have no greater right at common law to arrest for breaches of the peace than have private citizens. They may, of course, receive the prisoner after the arrest has been made. The general rule is that one may arrest to stop a breach of the peace which is being committed in his presence or to prevent its renewal. Flight from a lawful attempt to arrest does not defeat the right, if pursuit be made at once and continued till the arrest is effected, even though at that time the breach of the peace is over and there is no danger of renewal.

"Presence" does not require sight; it has been held that it is enough if the party arresting heard a pistol shot in the next room. In any case where an arrest is made by a private person he must with reasonable dispatch hand over his prisoner to a peace officer or bring him before a magistrate.

§ 38. **Arrests for other misdemeanors.—Statutes.** There is no right at common law to arrest without a warrant for misdemeanors other than breaches of the peace, there being no emergency sufficient to justify it. The right of officers to arrest without a warrant has been very much extended by modern legislation, especially in case of police officers of large cities.

## Section 8. Deceit.

§ 39. **Essentials of deceit.** Inducing a person to part with his property upon credit by falsely representing that one has a large amount of property, or inducing a person to buy property

by falsely representing it to have certain qualities are common examples of deceit.

In order to make out a case of deceit the plaintiff must allege and prove the following essentials:

1. That the defendant made a representation to the plaintiff.
2. That the representation was not true in fact.
3. That the defendant did not believe that it was true in fact.
4. That the representation was made with intent that the plaintiff act upon it.
5. That the plaintiff acted in reliance upon the representation and was damaged by such action.

These essentials will be discussed below.

**§ 40. Representation distinguished from a promise.** An action of deceit will not lie for a mere breach of promise to do something in the future.

**§ 41. Representation of opinion.** The difference between fact and opinion is shortly this: Fact is generally a matter of sensation in which persons usually agree; while opinion is a matter of judgment in which persons are likely to differ. If, instead of stating a thing to be a fact, one merely purports to give his opinion, he is not liable in deceit, unless he lies as to what his opinion is. In Pasley v. Freeman [1] it was alleged that the defendant, intending to deceive the plaintiff, falsely represented to the plaintiff that one Falch was a person safely to be trusted, whereupon the plaintiff sold to said Falch upon credit; and that Falch was not a person safely to be trusted, which the defendant knew. The court held that while the defendant did not need to give any opinion as to Falch's credit, yet if he chose to give one he was entitled to protection only if he gave his honest opinion.

**§ 42. Representation of intention.** The state of one's intention as well as the state of one's opinion is a matter of fact. Hence, one may be liable in deceit for lying as to his intention. In Edgington v. Fitzmaurice [2] the directors of a corporation had represented in a prospectus that a certain loan which was asked

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[1] 3 Term Reports, 51.
[2] L. R. 29 Ch. Div. 459.

for was to be used for improvements; it was shown that the defendants used the money to pay off pressing liabilities and had so intended to use it when they issued the prospectus. It was held that the defendants were liable in deceit, Bowen, L. J., saying: "There must be a misstatement of an existing fact; but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else."

**§ 43. Suppressing part of the truth.** Even though everything the defendant says is true, he may yet be liable in deceit, as where the defendant wrote to the plaintiff a letter of recommendation of the defendant's son, asking the plaintiff to give him credit but failed to state that the son was a minor. The court held that when a party intentionally conceals a material fact, in giving a letter of recommendation, it amounts to a false representation.

The test in such cases seems to be this: Is the concealment such that the withholding of that which is not stated makes that which is stated false? Even though there be no duty to say anything, if one undertakes to make a statement, he is under a duty to tell the whole truth. In Newell v. Randall [3] the defendant stated to the plaintiff that he had $3,300 invested in business. It was couched in language calculated to negative the idea that this was merely the gross amount of his assets, and that he owed debts to the extent of two-thirds or the whole of that amount. It was held that concealment of this kind, under the circumstances, amounted to a false representation.

**§ 44. Positive belief an excuse.** If the defendant has a positive belief in the truth of the representation, he can not be held liable in deceit.

**§ 45. Representation made without belief.** Positive knowledge that the representation is false is not essential to make the defendant liable in deceit; it is sufficient if the defendant had no belief in its truth—that is, if he made it recklessly without caring whether it was true or false.[4]

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[3] 32 Minn., 172.

[4] Derry v. Peek, 14 App. Cases, 337 at 368

**§ 46. Representation of belief as knowledge.** Where accurate knowledge as distinguished from mere opinion is possible, the defendant may be held liable in deceit for representing his belief as knowledge. In Cabot v. Christie[5] the defendant stated to the plaintiff that of his own knowledge the farm which he afterwards sold him contained at least 130 acres; in fact, there were only 117. It was held that it was no defence that the defendant honestly believed that there were 130 acres, because he had represented his belief as knowledge, and the quantity of land in a farm was a matter upon which accurate or approximately accurate knowledge was not at all impossible or unusual.

On the other hand, if the subject matter of the representation is such that accurate knowledge is impossible or very difficult to obtain, a representation that he had knowledge is not actionable if the defendant honestly believed the statement to be true.

**§ 47. Intended benefit to defendant not essential.** It is not essential that the defendant be a party to a contract with the plaintiff or that he receive any benefit from the deceit. It is equally unnecessary that the defendant be actuated by any motive of gain for himself.

**§ 48. Representation need not be made to plaintiff in person.** The representation need not be made to the plaintiff in person; it may be made to a class of persons of whom the plaintiff is one, namely, all who read a certain advertisement, or other public notice.

Where there is no intent that a representation be communicated to the plaintiff, the defendant is not liable. In Hunnewell v. Duxbury[6] the defendants as directors of a corporation made a false representation in a certificate filed with the commissioner of corporations, stating that the amount of the capital stock had been paid in; the plaintiff, relying upon the statement, bought notes of the corporation. The court held that the defendant was not liable, saying: "In the case at bar, the certificate was made and filed for the definite purpose, not of influencing the public, but of obtaining from the state a specific

[5] 42 Vermont, 121.
[6] 154 Mass., 286.

right [to do business within the state] which did not affect the validity of its contract, but merely relieved its agents in Massachusetts of a penalty. It was not addressed to or intended for the public, and was known to the plaintiff only from the search of his attorney. It could not have been intended or designed by the defendants that the plaintiff should ascertain its contents and be induced by them to take the notes."

§ 49. **Necessity of plaintiff's reliance and damage.** If the plaintiff did not act in reliance upon the defendant's representation the defendant would not be liable, because he could hardly be said to have caused the plaintiff's damage.

§ 50. **Representation need not be predominant cause of plaintiff's action.** It is not necessary that the representation be the sole or predominant inducement for the plaintiff's action. If the deceit was any material part of the cause of the plaintiff's action, it is sufficient.

§ 51. **Representations of intention as to price.** Where parties stand in the relation of vendor and purchaser, some representations are regarded as not being actionable though all the essentials of deceit are present. If a vendor should falsely represent that he did not intend to take less than a certain price, or a purchaser that he did not intend to give more than a certain price, such representations would not be actionable though made with intent to deceive.[7]

§ 52. **"Puffing": Representations of value.** So, certain representations made by a vendor by way of puffing his wares fall within the non-actionable class. In Harvey v. Young[8] the defendant, to induce the plaintiff to buy an interest in some property, fraudulently represented that the interest was worth £150. The plaintiff paid him £150 for it but could not resell it for £100. The court held that this did not make out a case of deceit, saying, "it was the plaintiff's folly to give credit to such an assertion."

In Deming v. Darling,[9] the defendant, to induce the plaintiff to buy a bond which was secured by a railroad mortgage, had

[7] Vernon v. Keyes, 12 East, 632.
[8] Yelverton, 21a.
[9] 148 Mass., 501.

represented that the bond was of the very best and safest, an A No. 1 bond, and that the mortgage was good security for it. The court held that the representations were not actionable, saying: "It is settled that the law does not exact good faith from a seller in those vague commendations of his wares which manifestly are open to difference of opinion, which do not imply untrue assertions concerning matters of direct observation, and as to which it has always been 'understood, the world over, that such statements are to be distrusted.' . . . If he went no further than to say that the bond was an A No. 1 bond, which we understand to mean that it was a first rate bond, or that the railroad was good security for the bonds, we are constrained to hold that he is not liable under the circumstances of this case. . . . The rule of law is hardly to be regretted, when it is considered how easily and insensibly words of hope or expectation are converted by an interested memory into statements of quality and value when the expectation has been disappointed."

"Assertions concerning the value of property which is the subject of a contract of sale, or in regard to its qualities and characteristics, are the usual and ordinary means adopted by sellers to obtain a high price, and are always understood as affording to buyers no ground for omitting to make inquiries for the purpose of ascertaining the real condition of the property."

**§ 53. What is not "puffing." Rental. Price paid on previous sale.** Representations as to what property is renting for, or as to the price paid at a previous sale are to be carefully distinguished from puffing. The former do not fall within the non-actionable class. Thus, representing that premises were let at £42 per annum when they were let at only £32 per annum was held actionable.[10]

**§ 54. Effect of parties being on an unequal footing.** If the parties are on an unequal footing, a representation which courts would otherwise be inclined to consider as puffing will be held to be actionable. In Coon v. Atwell[11] the plaintiff alleged that the defendant represented that the farm in question cut seventy-

[10] 1 Levinz, 102.

[11] 46 New Hampshire, 510.

five tons of hay a year, and that what hay was on the land was all cut that year and was a good seventy-five tons; whereas in fact the farm did not cut more than thirty-five tons a year, and the hay shown as cut that year was not all so cut, but a large quantity was cut the year before; also that the farm contained 250 acres, whereas in fact it contained only 175 acres. Both representations were held to be actionable, the court saying: "The defendant urges that the representations set forth are merely expressions of opinion. . . . It [the first representation] is not at all like the mere expression of an opinion as to value, but is a statement of a fact that in general would be peculiarly within the knowledge of the vendor; and to hold that it would be folly to confide in it would greatly tend to impair all further fair dealing."

**§ 55. Representations of law.** Representations of law are not actionable. The rule, however, seems to be limited to pure representations of law; hence, statements as to personal status and ownership which involve questions of fact as well as of law do not come within the non-actionable class. There are, besides, other modifications of the rule which tend to restrict its application within narrow bounds. In Moreland v. Atchison [12] the defendant sold Texas land to the plaintiff, representing that he was an old settler in Texas, was familiar with the land laws, and that he had a good title to the land. The court held that while the general rule was that representations of law were not actionable, yet the defendant was liable here because the parties were not on an equality, and the defendant took advantage of his superior knowledge; the question of title involved matters of fact as well as of law; and also because the plaintiff, not being a Texan, the law of Texas was foreign law and should be considered as fact. The effect of the last modification is apparently to limit the doctrine to representations of the law of the plaintiff's own country, with which he is supposed to be familiar.

## Section 9. Negligence.

**§ 56. Essentials of liability for damage caused by negligence**

[12] 19 Texas, 303.

The essentials of liability for damage caused by negligence are: (1) a legal duty to use care on the part of the defendant toward the plaintiff; (2) failure of the defendant to perform that duty; (3) damage to the plaintiff caused by such default.

§ 57. **When legal duty to use care arises.** The cases which are discussed in this section have been selected to illustrate in a general way how far the law has gone in imposing the duty of care. During recent years the law has developed rapidly in the direction of imposing the duty under circumstances where none was imposed before, because, in the increasing complexity of civilized life, the individual has in many instances become less able to protect himself against loss and so must rely upon society for such protection.

§ 58. **Standard of care: Ordinary prudence.** The standard of care required by the law of torts is that degree of care which would be exercised by a man of ordinary prudence under the circumstances.

§ 59. **Same: Under the circumstances.** Whether the amount of care owed is great or small or whether the defendant is under any duty of care at all depends upon the circumstances; hence negligence is a relative term. Conduct which would be considered negligence under some circumstances might be considered due care under other circumstances. In Meredith v. Reed[1] the defendant kept a stallion which escaped from the defendant's stable and injured the plaintiff's mare. The court said: "What is ordinary care in some cases would be carelessness in others. The law regards the circumstances surrounding each case, and the nature of the animal or machinery under control. Greater care is required to be taken of a stallion than of a mare; so, in the management of a steam engine greater care is necessary than in the use of a plow. Yet it is all ordinary care; such care as a prudent, careful man would take under like circumstances. The degree of care is always in proportion to the danger to be apprehended."

§ 60. **Degrees of care.** In the field of torts, the law has made no classification of degrees of care; while the circumstances that

[1] 26 Indiana, 334.

may arise vary greatly and therefore the care which the law requires likewise varies, the same standard applies to all cases,—that of the ordinarily prudent man under similar circumstances; and this is usually called ordinary care. Since there is just one standard for all cases, there are no legal degrees of care in torts.

**§ 61. Degrees of negligence.** The amount of care which the defendant actually used may have been only slightly less than that which the law requires, or it may have been very much less; this is sometimes expressed by saying that the defendant was slightly negligent, or that the defendant was grossly negligent. The defendant is liable to the same extent, however, in each case; hence, there are no legal degrees of negligence.

**§ 62. Meaning of legal cause.—A mixed question of law and fact.** Legal cause as distinguished from chemical cause, physiological cause, and so forth, shows that causal connection is sought to be traced to a human agent and that legal liability is sought to be imposed upon him. While a question of cause is one purely of fact, a question of legal cause involves also a question of law, namely, for what part of the consequences flowing from his wrongful act is a defendant to be held responsible? Like the question of negligence, the question of legal cause is a mixed one of law and fact, and for the same reason, namely, that the law does not lay down a definite rule

**§ 63. Defendant not liable for remote consequences.—The "natural and proximate consequence" rule.** Our knowledge of the laws of nature is so imperfect that it is often a difficult matter to determine whether the plaintiff's damage is a consequence of the defendant's act. In order, therefore, to secure practical justice, it has long been settled that a defendant will not be held liable for such consequences as are far removed in the chain of causation. Such consequences are called remote in contradistinction to near or proximate consequences. One of the rules of legal cause holds a defendant liable for such consequences as are natural and proximate; such a rule excludes only unnatural and remote consequences. Just how far removed in the train of causation the consequences must be in order to be excluded on the ground of remoteness, the law does not attempt to define.

**§ 64. Remoteness not controlled by time or distance.** Re-

moteness is governed by the efficiency of the defendant's act in causing a succession of events rather than by the elements of time or distance. In Poeppers v. Missouri, &c., Railway Co.,[1] some sparks from a locomotive of the defendant set fire to the prairie near the defendant's track about two o'clock in the afternoon of a certain day; the grass being very rank and dry and the wind being high, the fire extended about two and one-half miles before night and continued to burn through the night, though slowly; but in the morning the wind rose again and blew hard, as was not unusual in that country, and carried the fire some five miles farther, till it reached the plaintiff's property and destroyed it. The railroad company was held liable for the plaintiff's damage.

**§ 65. Defendant liable for probable consequences.** It seems also well settled that a culpable defendant is liable at least for such consequences as might have been foreseen by a prudent man in the position of the defendant.

**§ 66. The "natural and probable consequence" rule.** Another rule of legal cause which has been frequently laid down holds a culpable defendant liable for natural and probable consequences.

**§ 67. Defendant liable for immediate consequences, though improbable.** Even in jurisdictions which usually lay down the natural and probable consequence rule, if the damage follows immediately the mere fact that it was improbable does not excuse the defendant. In Hill v. Winsor[2] tort was brought against the owners of a tug for personal injuries sustained by the plaintiff through the alleged negligence of those in charge of the tug in causing her to strike violently against the fender of a bridge, on which the plaintiff was at work. The fender consisted of a row of piles driven perpendicularly into the bed of the stream and another row driven at an angle to the first; the plaintiff was standing on a plank fastened to the piles and had put a brace between one of the uprights and one of the inclined piles in order to keep them apart while he fitted them to be fastened

[1] 67 Mo., 715.
[2] 118 Mass., 251.

together. The striking of the tug against the fender caused the brace between the piles to fall out, the piles came together, the plaintiff was caught between them and was severely injured. The defendant was held liable.

**§ 68. Contributory negligence: General rule.** The general rule is that even though the defendant was negligent and his negligence was a part of the legal cause of the plaintiff's damage, yet if the plaintiff did not use ordinary care for the safety of himself or his property and such negligence was also a part of the legal cause of his damage, he is not entitled to recover. Such negligence on the part of the plaintiff is called contributory negligence.

By the general common law rule a plaintiff whose negligence contributed to his injury is entirely barred even though he was less to blame for the damage than the defendant.

In Illinois and a few other states it was at one time held that if the negligence of the plaintiff was much less in degree than that of the defendant, the plaintiff could recover. This was called the rule of comparative negligence; it is no longer law anywhere, except by a few statutes, the most important of which is the Federal carriers' liability act.[1]

**§ 69. Admiralty rule.** In admiralty cases, where there is no trial by jury, a plaintiff guilty of contributory negligence is not entirely barred, but may recover part compensation—usually one-half. In a collision case where the defendant also suffers some damage, the case is usually settled by adding the loss of both together, dividing the sum by two, and giving the plaintiff judgment for the difference between that sum and the amount of his own loss.

**§ 70. Modern legislation.** The general common law doctrine of contributory negligence has been much criticised as unjust to plaintiffs; and since with the jury system divided damages does not seem feasible, there have been various exceptions introduced by legislation in recent years. In England, for example, the workmen's compensation act allows recovery to a workman against his employer except in cases of "serious and wilful mis-

[1] 35 Stat. c. 149.

conduct." In other jurisdictions plaintiffs have been helped by statutes requiring the defendant in certain classes of cases to prove due care on his part as well as lack of due care on the part of the plaintiff.

§ 71. **Common law exception to the general rule.** There is a common law exception to the general common law rule, but the exact limit of the exception is not well settled. In Davies v. Mann[2] plaintiff had fettered a donkey belonging to him and turned it out into the highway to graze. The defendant's wagon, with a team of three horses, coming down a slight descent ran over the donkey and killed him. The driver of the wagon was some distance behind the horses. The trial court told the jury, that though the act of the plaintiff, in leaving the donkey on the highway so fettered as to prevent his getting out of the way of carriages traveling along it, might be illegal, still, if the proximate cause of the injury was attributable to the want of proper conduct on the part of the driver of the wagon, the action was maintainable against the defendant. This charge was held correct, Parke, B., saying, "although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover."

It does not clearly appear in the above case whether the driver saw the danger or whether his negligence consisted in not seeing it. In the United States the exception seems to be limited, by the weight of authority, to cases where the defendant alone saw the danger in time to avoid the damage by the exercise of ordinary care; this is frequently called "the last clear chance to avoid" rule. By the law of England the exception seems to be broader than this, but whether the test is that the defendant's negligence be later and nearer the accident, or that it alone be in motion at the time of the injury, or that the defendant alone be present at that time, does not seem to be settled.

In Radley v. London and Northwestern Railway Co.[3] plaintiffs

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[2] 10 Meeson v. Welsby, 546.

[3] L. R. 1 App. Cases, 754

who owned a colliery near the defendant's railway, had left upon their sidetrack a car with a broken truck upon it, the combined height being about eleven feet. Defendant's servants, in pushing a long line of plaintiff's empty cars onto the siding, pushed the car with the broken truck upon it against a bridge of the plaintiff's and broke it, the car being too high to pass under. The court held that it was not sufficient to give the general rule of contributory negligence, saying: ". . . But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and though that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." It appeared in this case that the defendant's servants did not see what the danger was; their negligence consisted in not investigating when the train was stopped by the bridge.

**§ 72. Contributory negligence of children.—Standard of care.** "Children constitute a class of persons of less discretion and judgment than adults of which all reasonably informed men are aware. . . . Therefore, in the application of the doctrine of contributory negligence to children, . . . their conduct should not be judged by the same rule which governs that of adults, and while it is their duty to exercise ordinary care to avoid injuries, ordinary care for them is that degree of care which children of the same age, of ordinary care and prudence, are accustomed to exercise under similar circumstances."

**§ 73. Duty to look out for trespassers.** Whether the occupier of land is under any duty to look out for trespassers while changing or when about to change the condition of the premises seems to be an unsettled question. The point has generally been raised in cases where a trespassing person or animal has been injured by a railroad train. The better view is that the land occupier does owe such a duty, where trespassing has been so frequent in the past as to make it likely that trespassers will be on the land

In Cincinnati, &c., Railroad Co. v. Smith[1] the action was brought to recover the value of two horses alleged to have been killed through the negligence of the servants of the defendant railroad company in operating one of its trains. The court held that the defendant was under a duty to look out for trespassing animals on a track, saying: "If the servants of the company in charge of the train, having due regard to their duties for the safety of the persons or property in their charge, could, by the exercise of ordinary care, have seen and saved the horses, we think they were bound to have done so."

**§ 74. The turntable cases.—Duty of land occupiers toward children.** While the land occupier owes no duty of care toward trespassers to keep premises in repair or to warn of perils, an exception has been made in some jurisdictions where the trespassers are small children. Since many of the cases where the question has arisen have been those of railroad turntables the cases are frequently called the "turntable cases."

In Keffe v. Milwaukee & St. Paul Railway Co.[2] the plaintiff, a boy of seven, was injured by playing upon the defendant's turntable which was located in an open space near the defendant's passenger depot, and not fenced or guarded in any way; the turntable thus located was very attractive to young children. The defendant was held under a duty to the plaintiff on the ground that the child did not occupy the position of an ordinary trespasser. The court said: "The defendant knew that by leaving this turntable unfastened and unguarded, it was not merely inviting young children to come upon the turntable, but was holding out an allurement, which, acting upon the natural instincts by which such children are controlled, drew them by those instincts into a hidden danger."

If as a matter of fact the defendant did allure the children upon the turntable, it is obvious that it ought to be held liable. The decision, however, has been followed in cases where there were no allurements and where the children were regarded as trespassers.

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[1] 22 O. St. 227.

[2] 21 Minn. 207

§ 75. **Adjacent public way.** In Barnes v. Ward [3] action was brought for wrongfully causing the death of one Jane Barnes. The defendant had made an excavation near a public way in the process of building a house. The deceased on a dark night wandered from the way, fell into the excavation and was killed by the fall. The defendant contended that since the hole was on his own land, he was under no duty to fence it. The court held, however, that he was under such a duty; because of the nearness of the way it interfered with the safety of it. In a Connecticut case [4] it was held that the test was not the number of feet distant, but whether the excavation was so near the highway as to cause substantial danger to careful travelers.

§ 76. **Duty to licensee.** A licensee is a person who is upon the premises of another with the permission of the latter. This permission may be express, or it may be implied by circumstances. If A repeatedly crosses B's land with B's knowledge, and B does not object to it, a license or permission may be implied. The difference between a trespasser and a licensee under such an implied license is one of degree, and it may be very difficult in a particular case to decide whether the plaintiff was the one or the other.

§ 77. **Statement of rule.** Whatever duty is owed by a land occupier to a trespasser is of course owed to a licensee. He is, besides, under a further duty of warning the licensee of perils or dangers on the premises, provided: (a) the land occupier knows of them; (b) the licensee does not know of them; and (c) the ignorance of the licensee is known or should be known to the land occupier.

§ 78. **Duty to business visitor.** Business visitors are those who come upon the premises at the express or implied invitation of the occupier on business which is or may be of pecuniary interest to the occupier. The most common illustration is that of a person who enters a store for the purpose of buying goods which the storekeeper has for sale, but the term is by no means limited to such instances. Thus in Indermaur v. Dames [5] the

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[3] 9 C. B. 392.
[4] Norwich v. Breed, 30 Conn. 535.
[5] L. R. 2 C. P. 274.

court said: "The common case is that of a customer in a shop, but it is obvious that this is only one of a class; for whether the customer is merely chaffering at the time, or actually buys or not, he is, according to undoubted authority, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger of which the occupier knows or ought to know. This protection does not depend on the fact of a contract being entered into in the way of the shopkeeper's business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper, with a view to business which concerns himself. And if a customer were, after buying goods, to go back to the shop in order to complain of the quality, or that the change was not right, he would be just as much there at the invitation of the shopkeper, and as much entitled to protection during this accessory visit, though it might not be for the shopkeeper's benefit, as during the principal visit, which was."

**§ 79. Statement of the rule.** The land occupier is under a duty to warn not only of the perils of which he knows—as in the case of the licensee—but of those of which he ought to know; that is, he is under a duty to use care to discover hidden dangers.

**§ 80. Duty toward those invited not on business.** In this country what little authority there is seems to give to the person invited not upon business the same rights as to those who are business visitors.

## Section 10. Defamation.

**§ 81. Protection to right of reputation.** The right protected by the law of defamation is the right of reputation. One's reputation depends upon the opinion which other persons entertain of his character. One's reputation is therefore damaged by communicating to the minds of third persons something which is disparaging. No action will lie, however, unless the matter so communicated is untrue.

**§ 82. Definition of defamation.** A statement or other communication to the mind of another is defamatory of a person if

it: (a) holds him up to hatred, contempt, disgrace, or ridicule; or (b) tends to injure him in his office, business, trade, or profession.

**§ 83. Forms of defamation: Slander and libel.** Slander is, generally speaking, oral defamation; it includes, however, all defamation in temporary, fugitive form; for example, hissing an actor, if defamatory, would be slander; so, imitating another's walk, or conveying ideas by gestures, if defamatory, would be slander.

Libel is, generally speaking, written or printed defamation; it includes, however, all defamation in permanent form, such as painting, caricature, effigy or emblem. For example, leaving a gallows in one's doorway, if defamatory, would be libel.

In the case of either libel or slander no action will lie, till it is communicated, or published.

**§ 84. Communication to the plaintiff himself not sufficient.** The word "publication" is used in this respect not in its ordinary sense of communication to the general public, but in the sense of communication to anyone other than the plaintiff. Communication to the plaintiff is not sufficient. Thus in Clutterbuck v. Chaffers[1] it appeared that the defamatory letter in question was delivered to the plaintiff and that no one else read the letter. It was held that the plaintiff was not entitled to recover. The reason for this is that the plaintiff's opinion of himself is no part of his reputation. The criminal law, however, punishes the sender in such a case, because the communication of defamatory matter to the plaintiff tends to a breach of the peace.

**§ 85. What is a communication?** In Snyder v. Andrews[2] the defendant, before sending the defamatory letter in question to the plaintiff, read the letter to one X. This was held to be a publication of the letter and therefore an action for libel lay. Likewise, in Delacroix v. Thevenot[3] a defamatory letter was sent by the defendant to the plaintiff and was opened by the plaintiff's clerk.

**§ 86. Libel actionable without special damage.** As will be

[1] 1 Starkie, 471.
[2] 6 Barbour, 43.
[3] 2 Starkie. 63.

seen later, to make slander actionable special damage must be proved, except in certain cases (§ 87, below). On the other hand, it is never necessary in the law of libel.

§ 87. **Defamatory statements actionable per se.** There are three classes of defamatory statements which are actionable per se (in themselves); that is, without proof of special damage. These are: words imputing crime, words disparaging a person in his trade, business, office, or profession, and words imputing a loathsome disease. Special damage is not required to be shown, probably because these are among the most serious charges that can be made; the law allows the plaintiff to sue at once without making sure that he can prove damage, and thus gives him better legal protection.

§ 88. **Words disparaging a person in his trade, business, office or profession.** Defamatory charges of this sort may be either that the plaintiff lacks an essential requisite with reference to his trade, business, office, or profession, such as honesty, capacity, fidelity, or the like; or that the plaintiff has been guilty of actual misconduct in the course of such a trade, business, office, or profession.

§ 89. **Lack of essential requisite.** A charge of insanity is probably not actionable at all where it is not made with reference to the plaintiff's calling; it is actionable per se there because it imputes the lack of an essential requisite for pursuing the calling. An imputation of insolvency is not defamatory generally, since it does not bring one into hatred, contempt or ridicule, because one may lose his money by misfortune; but if it is made with reference to one who is engaged in trade or business, it is defamatory and actionable per se, because a business man must have credit to succeed in his calling.

§ 90. **Liability for repetition.** If the person to whom the defendant makes a defamatory statement should repeat this statement, the defendant may be liable also for such repetition. He clearly is so liable if he authorizes it; also even without authorizing it, if he intended that it be repeated; for example if he knowingly told it to a notorious talebearer and tattler.

§ 91. **Justification: Truth of publication.** In a civil action for slander or libel it is always a complete defence that the de

famatory charge is true. It is immaterial whether or not the defendant believed it was true at the time he made it or what his motive was in making it.

The plea of truth is construed with great strictness. Thus in Leyman v. Latimer[4] the statement was, "the plaintiff is a felon." The plea of truth was held not to be made out because the plaintiff had received a pardon for the felony—from the moment of the pardon he was no longer a felon.

§ 92. **Burden of proof.** The plaintiff does not need to prove that the charge was false; if the defendant relies upon the defence of truth, he must prove it. In some jurisdictions the defendant is required, if he sets up truth as a defence, in cases where the defamatory statement charged the plaintiff with a crime, to prove beyond a reasonable doubt that the plaintiff committed the crime.

If the defendant sets up truth and fails to prove it, the effect of such failure in some states is to increase the damages.

§ 93. **Effect of defendant's belief in truth of publication.** The defendant's belief—though honest and reasonable—is not, in itself, a defence. Where the defendant, however, not only knew the statement was untrue, but was actuated by ill will toward the plaintiff, the jury is allowed in some jurisdictions to give the plaintiff punitive damages in addition to full compensation.

§ 94. **Repetition of another's statement.** As great an injury may accrue from the wrongful repetition, as from the first publication of slander. The person who repeats it gives greater weight to the slander. A party is not the less entitled to recover damages for injurious matter published concerning him, because another person previously published it.

§ 95. **Absolute privilege.** Under some circumstances it is excusable to publish matter which is both false and defamatory. The reason for this is, shortly, that in the affairs of life it is sometimes necessary for the public welfare that an individual's reputation be damaged without liability. Privilege is therefore a kind of justification. In the following cases the privilege is

[4] 3 Exch. D. 15, 352.

absolute—that is, the parties are protected even though they act from an improper motive and have no belief in the truth of the statements they make:

A. The chief executive of the United States and of each state and members of the federal and state legislatures, while acting in their official capacities.

B. Judges, juries, parties, counsel, and witnesses, as to relevant statements in the course of judicial proceedings.

C. Reports of naval and military officers in the course of their duty.

**§ 96. Fair comment or criticism—Importance of motive.** Anything placed before the public for public consideration—such as a book or play—and the conduct of public men may be commented upon and criticised, provided that such comment and criticism be fair and that it be made without malice. The subject of malice will be discussed below (see § 100); briefly, the requirement that it be without malice is that the criticism be made in good faith with the motive of setting before the public the defendant's honest opinion. The right of fair comment does not give the defendant a right to make purported statements of facts which are untrue; for example, that a certain assertion is in a book which is not there or that a public man said or did something which he did not say or do; nor is there any right to comment upon such untrue statements of fact. The public acts of a public man may lawfully be made the subject of comment or criticism, not only by the press but by all members of the public. But the distinction cannot too clearly be borne in mind between comment or criticism and allegation of facts, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert falsely that he has been guilty of particular acts of misconduct.

**§ 97. Reasons for allowing fair comment.** In Carr v. Hood [5] the defendant had ridiculed a book which the plaintiff had written and published. Lord Ellenborough said: "Every man

[5] 1 Campbell, 355. n.

who publishes a book commits himself to the judgment of the public, and any one may comment upon his performance. If the commentator does not step aside from the work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right.

98. **Unfair comment not allowed even though made with proper motive.** In Campbell v. Spottiswood[6] the defendant in a newspaper charged the plaintiff with using a scheme for raising money for missions as a means of personal gain to himself and in using fraudulent devices to procure contributions. In holding that the defendant was not justified, though the jury found that he honestly believed what he wrote, Cockburn, C. J., said: "In the present case, the charges made against the plaintiff were unquestionably without foundation. It was competent to the writer to have attacked the plaintiff's scheme; and perhaps he might have suggested, that the effect of the subscriptions which the plaintiff was asking the public to contribute would be only to put money into his pocket. But to say that he was actuated only by the desire of putting money into his pocket, and that he resorted to fraudulent expedients for that purpose is charging him with dishonesty: and that is going further than the law allows. . . . It is not because a public writer fancies that the conduct of public men is open to the suspicion of dishonesty, that he is therefore justified in assailing his character as dishonest."

§ 99. **Who has the right of fair comment?** In cases of absolute privilege discussed in subsection 95, above, and of conditional privilege (with the exception of privileged reports) to be discussed in the next paragraph, certain members of the public are clothed with a greater immunity than the rest. In case of fair comment and privileged reports on the other hand, the right is common to all.

§ 100. **Conditional privilege—Meaning of malice.** One of the essentials of both fair comment and of conditional privilege is that the defendant act without malice. There is no such requirement in absolute privilege.

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[6] 3 Best & Smith, 369.

The meaning of "malice," in fair comment and conditional privilege, is the absence of proper motive.

This is usually a matter of inference from the circumstances. Thus in Jackson v. Hopperton[7] the plaintiff had been in the defendant's employ as a sales-woman; having left his employ of her own accord, she returned to get some of her property which she had left at his place of business and also to collect her wages; the defendant then accused her of taking a certain sum of money, but said, "If you had come back, I should have said nothing about it." A few days later, the plaintiff applied to one C for a situation; the plaintiff told the defendant that C would apply to him for a reference; the defendant then said, "I will give you no reference, but if you own that you took the money I will give you a reference." When C applied to the defendant and asked him his opinion of the plaintiff, the defendant said that the plaintiff was dishonest and had stolen money from him. The court held that, although the occasion was a privileged one, the jury was justified in finding malice and therefore the defendant was liable. The court said: "I think that the fact of charging her with stealing the money, and not making that charge until she had threatened to leave, and then the fact of his telling her that if she had come back he would have said nothing about it, and that if she owned she took it he would give her a reference, were sufficient facts to justify the jury in inferring that he was not performing the important duty between man and man of stating what he believed to be the plaintiff's true character when he spoke the words which are the subject of this action."

§ 101. **Privileged reports.** The rule as to privileged reports is very similar to the rule in regard to fair comment; that is, it is conditioned upon the report being fair and being made with the proper motive of giving the public accurate knowledge. The privilege is open to all.

The general rule is that a report should be a substantially accurate account of the proceedings as a whole; details may be either omitted or summarized. In Milissich v. Lloyd's[8] the court

[7] 12 Weekly Reporter, 913.

[8] 13 Cox, Criminal Cases, 575.

said: "The question is one for the jury and may be stated as follows: Was the report a fair one: that is, would it give a fair notion to people who were not there of what took place?"

**§ 102. What may be reported.—Reasons for the rule.** Proceedings in courts of law, proceedings in public legislative bodies, and proceedings in public meetings are all subjects of privileged reports.

**§ 103. Communication in the common interest of a maker and receiver, or in the interest of the maker alone.** A communication, made by a person immediately concerned in interest in the subject matter to which it relates, for the purpose of protecting his own interest, in the full belief that the communication is true, and without any malicious motive, is held to be excused from responsibility in an action for a libel.

**§ 104. Illustrations of the rule.** Common illustrations of privileged communications made in the interest of the recipient alone are: (1) statements made with regard to a servant to one who is about to give employment; (2) statements made by commercial agencies in regard to the credit of a business man to one about to extend such credit; (3) statements made in the line of fiduciary duties, by an agent to his principal or by an employee to his employer; (4) statements made between near relatives as to the character of a suitor of the recipient of the statement.

**§ 105. Communication may be voluntary.** It was at one time thought that the privilege in this class of cases extended only to communications made in answer to inquiries. That is no longer the law, though it is, of course, often easier to prove malice where the defendant volunteered the information.

**§ 106. Statements regarding suitor by one not a member of the family.** While among near relatives statements with reference to the character of a suitor are privileged, it seems probable that the privilege does not extend to one who is not a member of the family.

**§ 107. Excess of privilege.** The fact that one is privileged to make a statement to another person or to a class of persons does not give him the privilege of publishing it to the whole world. On the other hand, the privilege is not necessarily destroyed because the defamatory statement was communicated to

some one other than the one who was entitled to hear it. The test is whether the privilege was reasonably used; if it was not, the defendant is liable for such excess of privilege.

**§ 108. Use of newspapers to notify business customers.** In Hatch v. Lane [9] the defendant had published the following notice in the Taunton Daily Gazette, concerning the plaintiff: "A young man named George Hatch having left my employ and taken upon himself the privilege of collecting my bills, this is to give notice that he has nothing further to do with my business." At the trial the lower court charged the jury that "the publication was a privileged communication if made in good faith in a local newspaper published in Taunton and the jury should find that it was a necessary or reasonable mode of giving notice." The upper court held that this charge was correct, saying: "If the circulation of the newspaper was more extensive than the routes of the defendant's business; or if the communication thereby came to the notice of persons not customers of the defendant, that fact would not, of itself, defeat the defence of privilege; nor necessarily prove malice. It would be evidence upon the question of express malice to be considered by the jury. That question was submitted to the jury under proper instructions; and the jury by their verdict, have found that it was a reasonable mode of giving the notice; thus negativing express malice."

It was material that the paper was a local one; if it had been a large city daily, it would have been more difficult to prove that the use of the privilege was a reasonable one. It was also material that it was the only reasonable method of reaching the customers of the defendant, who was a baker. Thus, reports sent by a commercial agency to its subscribers generally, including those who have no interest in the reports, are not privileged since it would be comparatively easy to send the reports only to those who are interested.[10]

**§ 109. Use of the telegraph.** Whether the telegraph may be used in making privileged communications depends largely upon the degree of emergency. It is probably reasonable to use it as a

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[9] 105 Mass. 394.

[10] Erber v. Dun, 12 Fed. 526.

means of intercepting suspected criminals, where waiting to send a letter would allow them to escape.

In Williamson v. Freer [11] the plaintiff was employed in the shop of the defendant, a shoemaker at Leicester; the defendant having accused the plaintiff of robbing him of money sent two post-office telegrams to her father, who resided in London, to inform him of his suspicions. The telegrams read as follows: "Come at once to Leicester, if you wish to save your child from appearing before a magistrate." "Your child will be given in charge of the police unless you reply and come today. She has taken money out of the till." The jury found that the statements were libelous and that it was not reasonable to send them by telegraph. The court held that the defendant was not entitled to privilege, saying: "Sending the messages by telegraph when they might have been sent by letter was evidence of malice. I desire, however, to make a still stronger statement. I think that a communication which would be privileged if made by letter becomes unprivileged if sent through the telegraph office unreasonably, because it is necessarily communicated to all the clerks through whose hands it passes. It is like the case of a libel contained on the back of a post card."

§ 110. **Is publication to a stenographer an excess of privilege?** Whether publication to a stenographer is an excess of privilege seems to be unsettled. In Pullman v. Hill [12] the court held that such dictation to a stenographer was not privileged, saying: "If a merchant wishes to write a letter containing defamatory matter, and to keep a copy of the letter, he had better make the copy himself. . . . He ought to write such a letter himself and to copy it himself, and, if he copies it into a book, he ought to keep the book in his own custody."

## Section 11. Interference with Business Relations: Inducing or Aiding Breaches of Legal Duty.

§ 111. **Introductory.** Not only does the law shield men from attacks upon their persons, property, or reputation, and protect

[11] L. R. 9, C. P. 393.
[12] [1891] 1 Q. B. 524.

them from deception and malicious prosecution, but it also guards from improper interference their more important social relations, particularly those of a family or business nature. The domestic relations have been thus protected from the earliest times, and, as the members of civilized communities become increasingly dependent for a livelihood upon business relations voluntarily entered into and sustained with one another, the importance of protecting these relations and preserving the opportunities to form them correspondingly increases. A free market for goods and labor is the economic ideal of this branch of the law, and any interference with this must show a justification. Such interference may affect relations already formed, or may merely prevent their formation.

**§ 112. Enticing away servant.** In Hart v. Aldridge[1] the action was brought for enticing away two of the plaintiff's servants who used to work for the plaintiff in the capacity of journeymen shoemakers; the jury found that the workmen were employed for no determinate time but only by the piece, and had, each of them, a pair of shoes unfinished at the time they left the plaintiff's service. The court held that the plaintiff was entitled to recover, Lord Mansfield saying: "The jury have found that these workmen were the plaintiff's journeymen. A journeyman is a servant by the day; and it makes no difference whether the work is done by the day or by the piece. He was certainly retained to finish the work he had undertaken, and the defendant knowingly enticed him to leave it unfinished."

In such a case the motive is not material. The action was originally founded upon an old statute of laborers, which made it a criminal offence for a servant to leave before the end of his term or for any party to receive and keep a servant who had so left; the action became so well settled that it survived the repeal of the statute. The theory of the statute of laborers was that the master's right was a property right and not merely a right of contract.

**§ 113. Contractual duties: Lumley v. Gye.** The modern rule

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[1] Cowper, 54.

is that if the defendant maliciously procures a third person to break his contract with the plaintiff, the plaintiff is entitled to maintain an action for the damage resulting.

The leading case on the point is Lumley v. Gye.[2] In that case one Miss Wagner was under a contract with the plaintiff to sing and perform for three months at the plaintiff's theatre; the defendant, the manager of a rival theatre, induced Miss Wagner to break her contract with the plaintiff. It was conceded that Miss Wagner was not a servant of the plaintiff within the rule as to enticing away servants. The court held that the plaintiff's action was maintainable, even though Miss Wagner had not entered upon the performance of the contract.

**§ 114. Meaning of malice in this connection.** The term "malice" used in this connection usually means that the defendant intended to gain a benefit for himself at the expense of the plaintiff. While this is generally allowable in case of ordinary business competition, the effect of Lumley v. Gye is to make it actionable to induce, with such a motive, others to break contract relations with a business rival. In Bowen v. Hall,[3] which affirmed the doctrine of Lumley v. Gye, the court said: "Merely to persuade a person to break his contract may not be wrongful in law or fact. But if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it. We think that it cannot be doubted that a malicious act, such as is above described, is a wrongful act in law and in fact. . . . It cannot be maintained that it is not a natural and probable consequence of that act of persuasion that the third person will break his contract. It is not only the natural and probable consequence, but by the terms of the proposition which involves the success of the persuasion, it is the actual consequence. Unless there be some technical doctrine to oblige one to say so, it seems impossible to say

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[2] 2 Ellis & Blackburn, 216.
[3] 6 Q. B. D. 333.

correctly, in point of fact, that the breach of contract is too remote a consequence of the act of the defendant."

Suppose the defendant induces the third party to break the contract for the benefit of the third party himself, instead of for defendant's benefit. In both Lumley v. Gye and Bowen v. Hall it was admitted that some kinds of benefit to the contracting third party might justify a defendant in persuading him to break the contract. Persuading a man to break a contract to voyage to a distant and unhealthful country was put as an instance. In a recent English case [4] the question arose on these facts: A large number of coal miners agreed to work for the members of a mine owners' association under a certain contract, one clause of which forbade its termination save upon notice. Their wages were fixed by a sliding scale dependent upon the price of coal. A miner's federation attended to the interests of the miners. The council of this federation, fearing an overproduction that would reduce the price of coal and so wages, ordered the miners to stop work for four days. The mine owners sued the federation and its council for causing this breach of contract to their damage, and were allowed to recover. The court said that a mere pecuniary benefit to a party from breaking his own contract was no sufficient justification to a third party who induced him to do so.

## Section 12. Same: Influencing Third Persons Who Owe No Legal Duty.

**§ 114a. Slander of title.** An action for slander of title lies in cases where the defendant makes a false statement to a third party with reference to the plaintiff's property, the defendant knew the statement was false, and the plaintiff suffered damage in consequence thereof.

**§ 115. Deceptive use of another's trade name.** In Stone v. Carlan [5] the plaintiffs, who were engaged in the passenger transfer business, had an agreement with the proprietors of the Irving House by which they were permitted to use the name of such

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[4] Glamorgan Coal Co. v. So. Wales Miners' Federation. (1903) 2 K. B. 545.

[5] 13 Law Register. 360

proprietors and the name of their hotel upon the plaintiff's coaches and the badges of their service. The defendant, who was a rival, also used the name of "Irving" upon his servants and coaches. The plaintiffs did not, as they might have done successfully, sue at law for damages but sued in equity for an injunction; the court granted the injunction, saying: "No man has a right to dress himself in colors, or adopt and bear symbols, to which he has no peculiar or exclusive right, and thereby impersonate another person, for the purpose of inducing the public to suppose, either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own. The same principles apply to a case of this sort. The false pretences of the defendant would, I think, necessarily tend to mislead. The defendants have a perfect right to engage in a spirited competition in conveyance of passengers and their baggage. They may employ better carriages than the plaintiffs. They may carry for less fare. They may be more active, energetic, and attentive. The employment is open to them, but they must not dress themselves in colors, and adopt and bear symbols, which belong to others."

**§ 116. Defaming persons closely associated with plaintiff.** In Riding v. Smith [6] the plaintiff was a grocer and draper and was assisted in conducting his business by his wife Margaret; the defendant published of the wife that she had been guilty of adultery, and as a consequence the plaintiff's business was injured; the defendant knew that his statement was false, and made it for the purpose of injuring the plaintiff. The court held that the plaintiff was entitled to a remedy, saying: "It is of little consequence whether the wrong is slander or whether it is a statement of any other nature calculated to prevent persons resorting to the shop of the plaintiff. Supposing the statement made not to be slander, but something else calculated to injure the shopkeeper in the way of his trade, as for instance the statement that one of his shopmen was suffering from an infectious disease, such as scarlet fever, this would operate to prevent people coming to the shop; and whether it be slander or some other statement which

[6] 1 Exch. Div. 91.

has the effect I have mentioned, an action can be maintained on the ground that it is a statement made to the public which would have the effect of preventing their resorting to the shop and buying goods of the owner."

§ 117. **Other illustrations.** In Ratcliffe v. Evans[7] the plaintiff had carried on for many years the business of engineer and boiler maker; the defendant, publisher of a weekly newspaper, printed a statement that the plaintiff had ceased to carry on the business, whereby the plaintiff's business was injured. The court held that the plaintiff was entitled to an action, saying: "That an action will lie for a written or oral falsehood, not actionable per se nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damages, is established law."

§ 118. **Interference by force.** In Tarleton v. M'Gawley[8] the plaintiffs had sent a vessel to trade with the natives on the coast of Africa. The defendant, maliciously intending to hinder the natives from trading with the plaintiff, fired from his ship into a canoe of natives and killed one of them, whereby they were deterred from trading with the plaintiff. The court held that the plaintiff was entitled to maintain an action, saying: "Had this been an accidental thing, no action could have been maintained; but it is proved that the defendant had expressed an intention not to permit any to trade until a debt due from the natives to himself was satisfied. If there was any court in that country to which he could have applied for justice he might have done so, but he had no right to take the law into his own hands."

§ 119. **Other illustrations.** In Green v. London Omnibus Company[9] where the defendant, an omnibus proprietor, with the purpose of preventing the plaintiff, his rival, from having a fair chance of attracting customers to his omnibuses, habitually placed his own omnibuses so close behind those of his rival that the doors of the latter could not be opened, it was held that the plaintiff was entitled to a remedy.

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[7] [1892] 2 Queen's Bench, 524.

[8] Peake, 205.

[9] 7 C. B. N. S. 29.

So it is actionable if, in order to injure the plaintiff, the defendant by force or threats of force prevents persons from being employed by the plaintiff, to the plaintiff's damage. This sort of case usually arises in labor disputes, where strikers place pickets to prevent other workers from taking their places.

### Section 13. Same: Persuasion and Economic Pressure—Competition—Motive—Combination.

**§ 120. In general.** Upon practically all the questions in this section there is a difference of opinion, and upon most of them a conflict of authority. The law is not likely to be settled until some economic questions arising out of modern business and industrial conditions are solved. Since the law is thus in a state of transition, it will be necessary to give the divergent views upon the points discussed.

**§ 121. Persuasion without justifiable cause.** In Walker v. Cronin [10] the plaintiff alleged in his declaration that the defendant, with intent to injure the plaintiff's business and without any justifiable cause, persuaded persons who were about to enter into the plaintiff's employment to abandon it, to the plaintiff's damage. The declaration was held sufficient, the court saying: "Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition; but he has a right to be protected against malicious and wanton interference, disturbance, or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is loss without legal wrong, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious act of others, without the justification of competition, or the service of any interest or lawful purpose, it then stands upon a different footing and gives rise to a right of action." The court expressly refused to decide what would be justifiable cause other than competition, but suggested that if it were by way of friendly advice, honestly given, it would probably not be actionable.

[10] 107 Mass. 555.

**§ 122. Who are competitors?** In so far as competition may be urged as a justification for persuading or by economic pressure coercing third parties not to have dealings with a plaintiff, it is necessary to define competition. Suppose A and X are each selling soap to druggists, and A offers lower prices, or refuses to sell to any druggist who will not buy of A exclusively. X is thus injured in his trade. Or suppose a labor union refuses to work for an employer unless he employs union labor exclusively, and non-union men thus lose employment. The contest between A and X and between the union and non-union men is here competition in the strict sense. Each is offering similar goods or services to a common customer, and each is trying to secure an exclusive market. In so far as competition is a justification, it is here established.

But suppose the members of a labor union leave A's employment in order to compel the payment of higher wages, and, this being ineffective, they refuse to deal with or work for A's customers unless they cease trading with A. A and the union are not competitors, strictly, because they are not offering to a common public or customer the same kind of goods or services. The union is simply trying to coerce an unwilling third party to take sides with it against A. This is what is called a boycott, and it is everywhere illegal.[11] The rival parties are not engaged in competition to secure trade or employment from common third parties, but are engaged in a bargaining struggle with each other, and neither may legally secure allies by economic coercion.

**§ 123. Persuasion by individual non-competitors.** In Graham v. St. Charles Street Railroad Company[12] the plaintiff was a proprietor of a grocery store opposite the defendant company's stable and other buildings; the other defendant, Newman, who was the foreman of the defendant company, and as such had the power of employing and discharging its employees, succeeded in inducing the employees, by persuasion and threats of discharge, not to deal at the plaintiff's store, to the plaintiff's damage; the defendant's motive in doing so was ill will toward

[11] Barr v. Essex Trades Council, 53 N. J. E. 101; Quinn v. Leathem, (1901) A. C. 495.

[12] 47 La. Ann. 214, 1657.

the plaintiff and a deliberate desire to injure him. The court held that the plaintiff was entitled to recover against Newman, but not against the company, because it was not responsible for the foreman's conduct. The court said: "A careful consideration of the testimony impresses us, as we must conclude it did the jury, that the defendant did use efforts to divert employees from dealing with the plaintiff, and that his motive was not to enforce the rules or discipline of the company. The right of protection to the citizen in the pursuit of the avocation by which he gains his livelihood is as important as the security of his person and property. No man is privileged to injure another in his business. If the defendant, Newman, by his conduct and language sought to create a feeling or prejudice against the plaintiff, deterring those from buying from him inclined to do so, we think reparation is due the plaintiff."

In the London Guarantee Association v. Horn [13] the plaintiff, Horn, while in the employ of Arnold, Schwinn and Company, as foreman of the frame department of its bicycle factory, was injured while engaged in his work. A., S. and Company carried with the defendant company an indemnity policy, indemnifying the firm against loss from injury to its employees; this policy, by its terms, could be cancelled by the defendant on five days' notice. The plaintiff brought suit against A., S. and Company and recovered a judgment for $3,500. The defendant's representative offered the plaintiff $100 in settlement of his claim and told him that unless he accepted that amount he would have the plaintiff discharged by A., S. and Company, who had reemployed him. The plaintiff refused the offer, and thereupon the defendant gave notice to A., S. and Company that unless they discharged the plaintiff the defendant would cancel the indemnity policy which A., S. and Company had upon the plaintiff. A., S. and Company thereupon discharged the plaintiff. The plaintiff did not have a contract of service with A., S. and Company, but the latter would have been willing to employ him indefinitely. The majority of the court held that the plaintiff was entitled to recover, saying: "Arnold, Schwinn and Company had the un-

[13] 206 Ill. 493.

doubted right to discharge Horn whenever it desired. It could discharge him for reasons the most whimsical and malicious, or for no reason at all, and no cause of action in his favor would be thereby created; but it by no means follows that while the relations between A., S. and Company and Horn were pleasant, and while, as the evidence shows, it was the expectation of the company that Horn would continue in its employ all the year round, that the interference of the defendant, whereby it secured the employer to exercise a right which was given it by the law, but which, except for the action of the defendant, it would not have exercised, is not actionable." The dissenting judges said: "That the defendant had a legal right to cancel the policy if its motive had not been bad is not denied, and the threat to do it did not become unlawful because of a bad motive. On that subject Mr. Justice Cooley says: 'Bad motive, by itself, then, is no tort. Malicious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful.' . . It certainly makes no difference whether the motive is to injure the employee who is discharged, or to obtain a benefit to the one causing a discharge."

The decisions in these cases would seem to represent the better view, but there are cases inconsistent with them. In Guethler v. Altman [14] the plaintiff was engaged in the confectionery and school supply business in the city of Huntington, and a large portion of his trade was obtained from the pupils of the city schools. One Crull, a teacher in the schools, succeeded in inducing, by means of persuasion and threats of suspension, many of the pupils from patronizing the plaintiff or visiting his place of business, whereby the plaintiff's business suffered serious damage. The court held that the plaintiff was not entitled to an action, saying: "It was not an unlawful act for Crull to advise or persuade the pupils not to visit the plaintiff's store. The fact that he acted maliciously does not change the rule. An act which is lawful in itself, cannot be made actionable because of the motive which induced it. A malicious motive will not make that wrong which in its own essence is lawful. We know of no

[14] 26 Ind. App. 587.

authority holding that an action will lie for maliciously persuading a party not to enter into a contract."

**§ 124. Persuasion by individual competitors.** Until a few years ago it was considered settled that the right to use persuasion in competition was practically absolute. The general right to damage another by competition had been long recognized. In a case decided in 1410, the plaintiff was a master of a grammar school at Gloucester; the defendant set up a rival school in the same town, so that instead of receiving two shillings a quarter from each child the plaintiff received less than a shilling. The court held that no action lay.

A modern illustration of competition is found in Robison v. Texas Pine Land Association.[15] The action was for damages for boycotting the plaintiff and breaking up his saloon business, located three miles from the defendant's store. The defendant corporation paid its employees in cardboard checks, redeemable in merchandise at the defendant's store. The words "not transferable" were printed on the checks, but the employees were accustomed to use them in place of money in small transactions with the plaintiff and others, and the defendant had honored the checks thus transferred. The defendant, in order to drive the plaintiff out of business, stated to its employees that it would discharge anyone who should buy goods or liquors at the plaintiff's store, and that it would not honor any checks which had passed through the plaintiff's hands; it also threatened to discharge any employee who refused to sign a petition for a local option election; by means of these acts on the part of the defendant, the plaintiff's business was damaged. It appeared that the plaintiff and defendant were business competitors except in the sale of liquor. The court held that no action lay, saying: "If the defendant could so control its employees as to prevent their dealing with the plaintiff, or so control their wages as to divert them from the plaintiff's business in favor of its own, we know of no rule making it actionable. Had the defendant no proper interest of its own to subserve in so doing, but had acted wantonly in causing loss to the

[15] 40 S. W. (Tex.) 843.

plaintiff, the rule would be different. The fact that the defendant's purpose by its acts was to break the plaintiff up in business would not give a cause of action, for that is the natural result of successful competition. . . . The defendant could not be required to treat the checks as money in the hands of other persons, which is practically the contention of the plaintiff. They could stop the system altogether without giving a right of action in tort, and it follows that they could place restrictions on the use of checks without incurring any liability."

**§ 125. Is the right to compete by lower prices absolute?** Generally speaking the right to offer goods at lower prices is justifiable competition, even though the effect of it is to ruin the rival's business. Suppose, however, the defendant offers his goods at prices below the price of production so as to drive competition out of the field, is this justifiable? In Passaic Print Works v. Ely Dry Goods Company [16] the plaintiff was engaged in the manufacture of prints or calicoes which it sold to jobbers, who in turn sold to retailers. The defendant company combining with others to injure the business of the plaintiff, offered for sale by circulars to the retail trade, prints at prices lower than those fixed by the plaintiff, the offer being made "as long as they last"; the defendant had but a small quantity to sell and made the offer to injure the plaintiff's business and not for any legitimate trade purposes. The majority held that no action lay. But Sanborn J., dissented, saying: "The proposition is sustained by respectable authority; it is just, and I believe it is sound —that an action will lie for depriving a man of custom (that is, of possible contracts), when the result is effected by persuasion as well as when it is accomplished by fraud or force, if the harm is inflicted without justifiable cause, such as competition in trade. . . . The petition in this case states a good cause of action for interference with and injury to the business of the plaintiff by preventing it from obtaining custom it would otherwise obtain, without any justifiable cause or excuse."

**§ 126. Effect of combination.—Combinations of capital or tradesmen.** May an act which is lawful when done by one in-

[16] 105 Fed. Rep. 163.

dividual become unlawful because several combine to do it? The ultimate decision of this question depends upon whether combinations are considered desirable. One view is that at common law the fact of combination is immaterial, and that the only remedy against combination must be furnished by statutes. In Mogul Steamship Company v. McGregor [17] the defendants, a number of ship owners engaged in the shipping business, formed a combination to drive competitors, of whom the plaintiff was one, from the field. They offered very low rates and besides offered a rebate of five per cent to all local shippers or agents who would deal exclusively with themselves. The court held that the plaintiff was not entitled to a remedy, because any individual ship owner could legally do this, and the fact that several combined to do it did not make it unlawful.

In Scottish Society v. Glasgow Association [18] the plaintiffs were a co-operative society whose purpose was to reduce the price of meat to the public; one set of defendants was a retail butchers' union which was a business rival of the plaintiffs; the other set of defendants were cattle or meat salesmen who dealt in American and Canadian meat and controlled that market. The butchers' union induced the meat salesmen not to sell to the plaintiff by threatening not to buy anything from the salesmen if they did. The court, following the Mogul Steamship case, held that the plaintiff was not entitled to recover, saying: "It is a very serious matter that one of the gates of the country, so to speak, should be closed against a considerable class of the people, and that the trade in foreign meat should be somewhat artificially diverted and confined. I do not know whether harm is caused or not; but if there be, I am unable to see that it can be remedied as matters stand, except by legislation; unless, indeed, the butchers' combination can be met by some counter plan, or can be checked by the force of public opinion."

§ 127. **Same: Another view.** Another view is that there should be a remedy at common law in cases of combination, because it is usually impossible for one to protect himself against

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[17] 23 Q. B. D. 598.

[18] 35 Scottish Law Reporter. 645.

several combined where he would be able to deal successfully with them individually. This view proceeds upon the ground that the continuance of competition is desirable.

For instance, in Jackson v. Stanfield [19] a combination of retail lumber dealers refused to buy of a wholesaler who sold directly to consumers or lumber brokers, of whom plaintiff was one. The wholesaler was thus coerced not to sell to plaintiff, whose business was thus injured. He was allowed to recover damages against members of the combination of retailers.

In many states such combinations are forbidden by statute, but, where not, probably more states permit a business combination of this character than would hold it illegal.

**§ 128. Same: Combinations of labor.** Where combinations of labor are engaged in a genuine competitive struggle—not a boycott—the most vital question is their right to strike for a "closed shop" as against the rights of non-union men. Just as a combination of capital or tradesmen seeks an exclusive market by refusing to deal at all with those who deal with their competitors, so a labor union seeks to exclude from employment non-union competitors by refusing to work at all for an employer who will not accept their services exclusively. If non-union men are thereby discharged may they recover damages against the union members who exercised this coercion upon the employer? There is the same sharp division of opinion among the courts here as is to be expected upon any bitterly contested social and economic question where much is to be said upon both sides. Several states, including Massachusetts, Pennsylvania, New Jersey, Oregon, Texas and perhaps Maine, hold a strike for a closed shop illegal as against non-union men whose discharge is thereby compelled.[20] Others, including New York, Illinois, Indiana, Minnesota, England and Canada, hold such a strike legal, when peaceably conducted.[21]

**§ 129. Same: A third possible view.** Still another view is that there should be no remedy either by common law or statute

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[19] 137 Ind. 592.

[20] Berry v. Donovan, 188 Mass. 353; Erdman v. Mitchell, 207 Pa. 79.

[21] Nat. Protective Ass'n v. Cummings, 170 N. Y. 315; Allen v. Flood, (1898) A. C. 1.

merely because of the combination; that combinations, both of capital and labor, are natural products of our economic development, and should be protected as well as controlled. This view has not yet been adopted by any courts, though it has been strongly expressed by some economists and judges. The most forcible presentation of it is found in the dissenting opinion of Justice Holmes in Vegelehn v. Guntner [22] a quotation from which follows:

"I have seen the suggestion made that the conflict between employers and employed is not competition. But I venture to assume that none of my brethren would rely on that suggestion. If the policy on which our law is founded is too narrowly expressed in the term free competition, we may substitute free struggle for life. Certainly the policy is not limited to struggles between persons of the same class competing for the same end. It applies to all conflicts of temporal interests.

"So far, I suppose, we are agreed. But there is a notion which latterly has been insisted on a good deal, that a combination of persons to do what any one of them lawfully might do by himself will make the otherwise lawful conduct unlawful. . . . It is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the world, now going on so fast, means an ever increasing might and scope of combination. It seems to me futile to set our faces against this tendency. Whether beneficial on the whole, as I think it, or detrimental, it is inevitable unless the fundamental axioms of society, and even the fundamental conditions of life are to be changed.

"One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way."

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[22] 167 Mass. 92

**§ 130. Importance of motive.—Recent restatement of the question.** There are two antagonistic views as to the importance of malice or motive. The one is that in cases of persuasion, whether between competitors or not, motive is entirely immaterial; that if an act is otherwise lawful it cannot be made unlawful by the existence of a bad motive. On the other hand, during the past fifteen years the whole question of the legality of persuasion has been so restated as to make motive material in many if not most of the cases. As restated, a plaintiff makes out a prima facie tort whenever he shows that the defendant has intentionally caused him damage, and the burden is upon the defendant to show some justification.[23] Under this restatement, the right of competition becomes a justification, to be extended only as it is conducive to the public welfare. The advantage of the restatement is that it brings out very clearly the important question at issue; but that question—what is or is not justifiable—is still to be solved.

In Allen v. Flood [24] the plaintiffs were shipwrights and members of a union; they were employed to do woodwork by the day by the Glengall Company; the boiler makers' union objected to shipwrights doing iron work, and finding that the plaintiffs had shortly before been employed to do some iron work, the defendant, walking delegate of the boiler makers' union, threatened the Glengall Company that unless they discharged the plaintiffs, the boiler makers employed by the Glengall Company by the day would quit work. The Glengall Company thereupon discharged the plaintiffs. The trial court held that there was no evidence of any conspiracy or combination. The jury found that the defendant acted maliciously. The House of Lords held that no action lay because the motive was immaterial and the act was not otherwise unlawful; there was no prima facie tort. Under the new statement of the law as to persuasion above mentioned, the defendant would be considered as having committed a prima facie tort in intentionally causing damage to the plaintiff; this would place the burden of justification upon the defendant.

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[23] 8 Harv. Law Rev. 1-14; Plant v. Woods, 176 Mass. 492.

[24] L. R. (1898) A. C. 1.

**§ 131. Present uncertainty of this branch of the law.** In the present state of the law no general rule can be laid down as to the legality of many of the various means employed in a trade or labor dispute. Neither courts nor legislatures are agreed as to how far a combination of laborers or capitalists may go in advancing their interests. Much will depend, in settling the law, upon the drift of public opinion during the next few years. The case of Plant v. Woods[25] typically shows the divergent views. In this case the plaintiffs and defendants were officers and members of rival labor unions; the defendant union which had its headquarters at Baltimore sought by various means to compel the members of the other union, which had its headquarters at Lafayette, Indiana, to join the defendant union. In the case of at least one employer the defendant union threatened to leave off his name from a so-called "fair list" published by the defendant union, unless the employer would cease to employ members of the Lafayette union. The majority of the court, declining to follow Allen v. Flood, held that the plaintiff was entitled to protection against such acts, saying: "We have, therefore, a case where the defendants had conspired to compel the members of the plaintiff union to join the defendant union, and to carry out their purpose have resolved upon such coercion and intimidation as naturally may be caused by threats of loss of property by strikes and boycotts, to induce the employers either to get the plaintiffs to ask for reinstatement in the defendant union, or, that failing, then to discharge them. . . . Without now indicating to what extent workmen may combine and in pursuance of an agreement may act by means of strikes and boycotts to get the hours of labor reduced or their wages increased, or to procure from their employers any other concession directly and immediately affecting their own interests, or to help themselves in competition with their fellow workmen, we think the plaintiffs are entitled to a remedy in this case. The purpose of these defendants was to force the plaintiffs to join the defendant association, and to that end they injured the plaintiffs in their business, and molested and disturbed them in their efforts to work

[25] 176 Mass. 492.

at their trade. It is true they committed no act of personal violence, or of physical injury to property, although they threatened to do something which might reasonably be expected to lead to such results. In their threat, however, there was plainly that which was coercive in its effect upon the will. It is not necessary that the liberty of the body should be restrained. Restraint of the mind, provided it would be such as would be likely to force a man against his will to grant the thing demanded, and actually has that effect, is sufficient in cases like this. . . . The necessity that the plaintiffs should join this association is not so great, nor is its relation to the rights of the defendants as compared with the right of the plaintiffs to be free from molestation, such as to bring the acts of the defendant under the shelter of the principles of trade competition. Such acts are without justification, and therefore are malicious and unlawful, and the conspiracy thus to force the plaintiffs was unlawful. Such conduct is intolerable, and inconsistent with the spirit of our laws."

Holmes, J., dissented on the ground that while there was a prima facie tort, the defendants were justified, saying: "I agree that the conduct of the defendants is actionable unless justified. I agree that the presence or absence of justification may depend upon the object of their conduct, that is, upon the motive with which they acted. I agree, for instance, that if a boycott or a strike is intended to override the jurisdiction of the court by the action of a private association, it may be illegal. On the other hand, I infer that a majority of my brethren would admit that a boycott or strike intended to raise wages directly might be lawful, if it did not embrace in its scheme or intent violence, breach of contract, or other conduct unlawful on grounds independent of the mere fact that the action of the defendants is combined. A sensible workingman would not contend that the court should sanction a combination for the purpose of inflicting or threatening violence or the infraction of admitted right. To come directly to the point, the issue is narrowed to the question whether, assuming that some purposes would be a justification, the purpose in this case of the threatened boycott and strikes was such as to justify the threats. That purpose was not directly concerned with wages. It was one degree more remote. The immediate

object and motive was to strengthen the defendants' society as a preliminary means to enable it to make a better fight on questions of wages or other matters of clashing interests. I differ from my brethren in thinking that the threats were as lawful for this preliminary purpose as for the final one to which strengthening the union was a means. I think that unity of organization is necessary to make the contest of labor effectual, and that societies of laborers lawfully may employ in their preparation the means which they might use in the final contest."

The decision of Allen v. Flood, mentioned above, so far as it held that an act which is lawful is not made unlawful if done with malice or bad motive, has been overruled in England and does not represent the law in that country today. The decision has been strongly criticized by American courts and textwriters. The weight of authority in this country is apparently against it, it being held that one cannot intentionally injure another without justifiable cause or excuse.[26]

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[26] Kamm v. Flink 113 N.J.L. 582 (1934).

## CHAPTER IV.

## PERSONAL PROPERTY AND BAILMENTS.

### Section 1. Nature of Property Rights.—Classification of Personal Property.

**§ 1. Property rights in rem and in personam.** The word property is used loosely and with several meanings. For our present purposes we may say that the right of property in a thing is the legal right to exercise dominion or control over it. Rights are divided into those available against the whole world, known as right in rem, and those available against one or more particular individuals, known as rights in personam. Rights in rem are the rights that the owner of land or goods has in them and with which no one may lawfully interfere, and, hence, are said to be rights against all men. Rights in personam are those rights that one or more individuals have against one or more other individuals and which exist against him or them alone, e. g., a right of action to recover a sum of money for failure to pay a debt or because of a wrong done.

In the sense in which we have used the word property we may say that rights in rem are property rights.

The violation of a right in rem may create a right in personam. Thus, if A is owner of land his right therein is a right in rem. If B trespasses on the land he has infringed A's right in rem and A now has a right in personam against B, namely, to bring an action against B and recover from him damages for the wrong done.

A right may be, in one aspect of it, a right in personam and, at the same time, a right in rem. Thus, in the case put, A's right in personam against B is itself with respect to all other persons

a right in rem. It is property and, as such, a right that A holds against the whole world and with which no one may interfere.

Property rights may exist, then, over actual things perceptible to the senses, such as land, cattle, and goods, and, also, over other rights, mere abstractions of the law.

In either case the property right is a right in rem and, applying the word property to the object with respect to which the property right exists, in the former case we say it is corporeal property and in the latter incorporeal property.

§ 2. **Distinction between real and personal property.** Property is classified as movable and immovable and as corporeal and incorporeal. The latter classification is recognized by our law and the distinction has some important effects, but with it we are not now concerned. The former, into movable and immovable, is a natural classification, but our law has adopted in place of it the division of property into personal and real, in the main corresponding, respectively, to movable and immovable, but with exceptions.

§ 3. **Real property.** Real property, broadly speaking, is all interests in land, except terms of years. The name is derived from the Latin name applied in early times to the action brought to recover land, *actio realis,* which means simply real action. It was given to that kind of action because in that action the land itself was recovered, and not merely a money equivalent for the land. Then the word "real," taken from the name of the action, was applied to the kind of property recovered in such an action. As real actions were brought for land only, real property became the name of property interests in land, with the exception of terms of years.

§ 4. **Personal property.** When the action was brought to recover a movable article, such as cattle or goods, i. e., something that was not land, the defendant could absolve himself by paying in money the value of the thing sued for, i. e., damages. Consequently, the action was in effect against a person and not against a thing and was classed with those actions brought to recover damages for a wrong or the breach of a contract and was known as an *actio personalis*, or personal action, and the name "per-

sonal" was given to the kind of property concerning which the action was brought.

Personal property, then, includes all property that is not real. Anything that is the subject of property and not land or a right in land is, in our law, personal property, and, in addition thereto, one kind of interest in land, namely a term of years, is personal property.

**§ 5. Term of years.** A term of years is the interest in land of a tenant for a certain number of years or portion thereof, the word "term" referring to both the period and the interest itself. Formerly, if the tenant was turned out of possession by either the landlord or a third person, he had no remedy by which he could recover possession of the land itself, but only an action for damages against the landlord on the covenant contained in the deed of lease. This was a personal action, and, on the death of the tenant within the term, the benefit of the covenant devolved upon the tenant's personal representatives who were entitled to his personal property. Later, a new action was introduced that gave the tenant a remedy by which he could recover possession of the land itself. Thus his interest became a property right in the land; but this new interest, naturally enough, passed, on the tenant's death, not to his heirs who took his real property but, as did before the rights under the landlord's covenant, to his personal representatives and so came to be classed as personal property instead of real property, although it is an interest in land.

**§ 6. Devolution of property at death of owner.** This is the best test of whether it is real or personal. Real property passes directly to the owner's heirs, while the title to personal property goes to his personal representatives, i. e., his executor or administrator. Things thus passing to heirs or inherited are termed hereditaments. They are treated under the head of real property and are properly real property, being land or interests in land with the exceptions mentioned below.

**§ 7. Special forms of property.** The English law recognizes certain inheritable property rights known as incorporeal hereditaments. With the exception of annuities these hereditaments are either not recognized as property in the United States, or are

rights in land. Annuities, when made inheritable by the heirs of the annuitant, seem to be personal property and a true exception to the statement that hereditaments are real property. They are rare. Some articles, personal in their nature, go to the heir under the name of heirlooms, as deer in a deer park, pigeons in a pigeon house, old family pictures, and the like.

A mortgagee's interest in a mortgage before foreclosure is personal property. So, also, is stock in a corporation, although the corporation owns real estate.

There is a class of personal property articles that are attached to the land and are known as fixtures, but while attached they are properly part of the land and are dealt with in the chapter on Landlord and Tenant, Chapter IX, § 22.

§ 8. **Personal property: Chattels.** The name "chattel" is sometimes applied to all personal property. Its derivation is obscure, and in its largest sense it can be best described, like the words "personal property," as signifying any species of property that is not real property. Its meaning is more commonly confined to things movable, corporeal in their nature, such as animals, household goods, money, clothing, grain, machinery, or any article that can be handled and transported, in distinction from incorporeal rights. These are also called "chattels personal."

"Chattels real" are terms of years, which have been considered above. As being personal property they are classed as chattels; as being interests in land they are denominated chattels real. It is immaterial with respect to their character as personalty how long the term may be, if of a determined length. Though it is for a thousand years it is a chattel interest, unless declared by a statute to be realty.

§ 9. **Same: Choses in action.** Choses in action, or things or rights in action, are personal rights to recover property or money by action. Thus a promissory note, or a bond, or a right of action for a tort are choses in action. They are distinguished from choses in possession, which are chattels reduced to actual possession. This division between things in possession and not in possession is another recognized classification of personal property.

## Section 2. Remedies for Infringement of Rights in Personal Property.

**§ 10. Detinue.** This is an action primarily for the recovery of specific personal property alleged to belong to the plaintiff, and, if the property is not found, then for damages for its value, and in either case, for damages for the detention. The option of giving up the goods or paying the value is in the defendant.[1] Consequently the action is not so effective to secure the specific property as is replevin, and detinue is seldom brought in the United States.

**§ 11. Replevin.** This is the common action in the United States to recover specific personal property. In England the action lies only when the property was wrongfully taken from the possession of the plaintiff.[2] Consequently there the plaintiff's only remedy is often detinue. In the United States replevin lies for the wrongful detention of personal property, whatever the nature of the original taking. Thus, where the defendant contracted to carry flour for the plaintiff and it was placed on board the defendant's ship, he afterwards refused to proceed because of a blockade without a guarantee from the plaintiff which the latter was not obliged to give. The plaintiff demanded the return of the flour, which the defendant refused. It was held that the plaintiff might maintain replevin for the flour.[3] If the original taking was lawful a demand by plaintiff is necessary to make the detention unlawful and to lay a foundation for the action. Damages for the detention may also be recovered in the action.

The property is taken from the defendant on a writ of replevin and delivered to the plaintiff at the beginning of the action upon the plaintiff's giving security that he will prosecute the action, and, if not successful, return the property with damages. Replevin is therefore a much surer remedy to recover the property itself than detinue, and as it lies in the United States

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[1] Phillips v. Jones, 15 Q. B. 859.

[2] Mennie v. Blake, 6 E. & B. 842.

[3] Stoughton v. Rappalo, 3 S. & R. 559; and see Dame v. Dame, 43 N. H. 37, for a discussion of detinue and replevin.

wherever detinue could be brought, it has in this country practically superseded detinue.

§ 12. **Trover.** We have spoken thus far of actions to recover specific personal property. When the plaintiff does not seek to recover the specific property but its value, he brings an action for damages. Trover is the common law action for the conversion of personal property. It may be brought when the defendant has wrongfully taken or retained goods of which the plaintiff had possession or the right to possession. The general rule is that the plaintiff recovers as damages the value of the property.

§ 13. **Trespass.** This action lies for taking personal property from the possession of the plaintiff, or for injuring it while in his possession. This is also discussed in Torts, Chapter III.

§ 14. **Case.** This form of action may be maintained by one in possession of property for a consequential injury resulting from the failure of the defendant to perform a duty imposed upon him. It is also the proper remedy for an injury to the plaintiff's reversionary interest in property in the temporary possession of another.

§ 15. **All personal property actions are possessory only.** As any of the actions mentioned above, both those for the recovery of the specific property and those for damages, may be maintained by a plaintiff whose only interest in the property is a right of possession, it will be seen that they try only the plaintiff's right of possession and are so-called possessory actions. Of course when the right of possession depends upon title, a determination of the right of possession determines the title, but there is no action that directly tries title to personal property.

## Section 3. Title to Personal Property by Occupancy and by Accession.

§ 16. **Chattels having no former owner: Newly created property.** Property newly created belongs to the one bringing it into existence. It seems that the only instances of this are the exclusive rights in literary works and inventions. If published to the world the exclusive property in them was lost at common law. The statutory provisions for preserving this property right are

found in the United States statutes relating to Patents and Copyrights.

§ 17. **Definition of accession.** Accession is the addition to the value of one's property of the labor or material of another. The word is also used in the sense of the right to such addition.

§ 18. **Who is entitled to accession?** When is one entitled to the accession to his property, or, in other words, when is he entitled to his property with the accession to it? The question arises when A has made accession of labor or material to the property of B. The answer to the question depends on whether title to the property has passed to A as a result of the accession. When A has made such accession in pursuance of an agreement with B to improve B's property for him, of course B retains title to the property as increased in value. Thus, if B takes his own materials to a tailor and employs the latter to make them into a suit of clothes, B owns the suit. When, however, A has converted [4] B's property and, without his consent, made accession to it, there may be a question whether the title has passed to A. If not, B still owns the whole. If the title has passed, it is no longer B's property, and he can recover only the value of the property originally converted.

§ 19. **The test of identity.** This was the one first adopted by the courts, the general principle being laid down that if one's property is converted and added to in value, but its identity is not changed, the original owner is entitled to it in its improved form. Thus where leather belonging to defendant was converted by the plaintiff who made it into slippers and shoes and boots, and the defendant took them, it was held that he might, for he had not lost his property, as its identity had not been lost. The court said that when one makes malt of another's grain, or pennies are made from metal, the former owner's title is lost for there the identity is gone. So, if A's timber is built into B's house it belongs to B because it has become real property.[5]

When we come to examine what is meant by a change of identity the unsatisfactory nature of this test becomes apparent, and there is great confusion in the books on the subject. Sometimes

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[4] Anon., Y. B. 5 Hen. VII. 15 pl. 6.

it is said[6] that the owner may reclaim the goods so long as they may be known, or, in other words, ascertained by inspection, and, sometimes, that when the thing is so changed that it cannot be reduced from its new form to its former state by "individual operation" its identity is gone.[7] In one case it was held that the owner of trees made into timber might reclaim the timber "because the greater part of the substance remains."[8]

These different rules cannot be reconciled or satisfactorily applied to the various examples put, as, grain made into malt, wheat into bread, and milk into cheese, in which cases the identity is said to be changed; and cloth made into a coat, leather into shoes, a tree into squared timber, and iron into a tool, in which it is said there is no change of identity.[9] There is, in truth, no definite rule as to what constitutes a sufficient change of identity to cause a loss of title, and the cases adopting this test are in hopeless confusion; nor does there seem to be any foundation of justice in the distinctions attempted to be made.

**§ 20. The test of increased value.** This is the natural and just one and is that which the modern cases are fast adopting, although the old phraseology about the change in identity is not wholly discarded. Though the courts speak of change of identity in many cases in which the decision is in fact based on the change in value, these are really instances of the conservatism of legal terms. The courts mean that change of identity is a matter of change of value. No other ground will explain the cases or is logical. It may be accepted that the modern doctrine of accession is based upon the extent to which there has been a change in value. If the convertor has added enough value to the property he has acquired title. On this point a distinction is to be made between a mistaken and innocent conversion and a fraudulent or wrongful conversion.

**§ 21. Innocent conversion.** When there has been a conversion through innocent mistake and the convertor has added

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[6] 5 Hen. VII, 15 pl. 6, supra.

[7] Lampton's exrs. v. Preston's exrs., 1 J. J. Marsh. 454, where brick made from another's clay that were burnt were held to be changed, but unburnt brick were not.

[8] Moore 19, pl. 67.

[9] And compare the decision and examples put in the anonymous case above

largely to the value of the property, he acquires title to it. The cases have not established any more definite test of the amount of accession necessary than that it shall be large enough so that it would be unjust to hold that the convertor shall lose his labor or material. If the action is replevin for the improved property, this is the only rule to be applied. If it is trover for the value of the property the equities can be more easily adjusted by allowing the plaintiff to recover only the original value of his property whatever the amount of the accession.

§ 22. **Wilful conversion.** When the convertor has wilfully and without right taken another's property and made a small increase in the value, the original owner does not lose title but may recover the property or its value with the increase. When, however, there has been a great change in value the question is more difficult. The general view, sustained by the weight of authority, is that a wilfully wrongful convertor cannot acquire title by accession however much value he may have added.

### Section 4. Title by Confusion.

§ 23. **Definition of confusion.** Confusion is such a mixture of the goods of two or more persons that they cannot be distinguished. It includes mixtures of similar goods, as of two quantities of the same kind of grain or liquid, and also of different kinds, where the result is a mass, the elements of which are indistinguishable, as of two kinds of liquids or metals melted and fused together, and where the original elements are practically inseparable, as wheat and oats thoroughly intermingled.

The doctrines of confusion and accession have some analogous features, but confusion is to be distinguished from accession, in that while accession is the addition in value made by one to the property of another, confusion is the mixture of the property of two or more persons. If A builds a house with B's bricks, it is the accession of B's bricks to A's land; if two piles of bricks, one belonging to A and one to B, are mixed together, it is confusion. Confusion often gives the different parties rights in common. In some cases of confusion they become owners in common of undivided shares in the mass. Accession never gives rights in common. One party or the other is the sole owner of the whole.

The important question is, "Who has title to the mass?" If the property of A and that of B are indistinguishably mixed, A or B may have title to the mass or each may own an undivided share in it.

**§ 24. General rule.** Where several different owners shipped cotton in a vessel which was wrecked and part of the cotton was lost and the marks on the remainder were obliterated so that the cotton of the respective owners could not be distinguished, it was held that the different owners become owners, or, as termed in law, tenants in common of the whole mass, each owning a share proportionate to his share of all the cotton shipped.[1] So if A and B, by mutual agreement, mix their grain, they become tenants in common, with interests proportionate to their contributions. These cases represent the general rule.

**§ 25. Effect on title of bailment or sale.** A bailment is the placing of personal property by one known as the bailor in the possession of another, known as the bailee, who is to return the identical property to the bailor. The purpose may be to give the bailee the use of the property or to have something done with it or to use it for the bailor's benefit, e. g., to have it stored or to have some work done upon it.

In the case of a true bailment, the bailee does not acquire title. He has merely the right of possession to carry out the purposes of the bailment. If the identical property is not to be returned, but something else in its stead, it is a sale and the title passes to the transferee of the property. Thus, where plaintiff delivered wheat to a miller under an agreement by which the miller was to give the plaintiff a barrel of flour for each amount of wheat of an agreed quantity, it was held that the transaction was a sale.[2] Where, however, wheat was furnished and flour was to be returned, and it was agreed that the flour was "to be made out of the wheat furnished by" the person furnishing it, it was a bailment.[3] In the former case there was no such obligation to return the flour made from the identical wheat.

**§ 26. Confusion by bailee and vendee.** Cases of confusion

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[1] Spence v. Union Marine Insurance Co., L. R. 3 C. P. 427.

[2] Smith v. Clark, 21 Wend. (N. Y.) 83.

[3] Inglebright v. Hammond, 19 Ohio 337.

frequently occur when a person, with whom property has been deposited, mixes it with the property of other persons or of himself. It becomes important to determine whether the transaction is a bailment or a sale. If it is the former, it is a case of confusion; if it is the latter, there is no real confusion. In Smith v. Clark, above, the wheat received from the plaintiff by the miller was stored by him in a common bin with other wheat. As the agreement made a sale, this was not a true case of confusion. The miller simply mingled his own property. When, however, a bailee mixes property of different owners deposited with him the result is a confusion. In Sexton v. Graham[4] grain was deposited with a warehouseman by different owners. The contract was that the grain was received in store subject to the orders of the depositors and it gave the warehouseman the right to mix the grain. He did so, mixed in grain of his own, and then wrongfully sold more than the amount of his own grain. In an action to determine the rights of the respective owners in the grain that remained it was held that the contract was a bailment and that all the several owners, including the warehouseman himself, became tenants in common. When one owner's share was drawn out the part taken became appropriated to him, and the others continued to own the rest in common. When more was added the new owner became a tenant in common with the others, the rights of the former owners attaching to the new grain so added. The warehouseman's act in withdrawing more than his own share was a conversion as to the excess, but it left the others tenants in common of the residue. It is a peculiar bailment, for, by the agreement, the bailee may substitute, by means of successive withdrawals and additions, different property for that bailed. Ordinarily the right to return other property would make a sale, but here it was a bailment with the right to mix, thus giving the bailee the right to substitute, but the bailor's title as bailor immediately attaching to the substituted property. The holding that the different depositors became tenants in common of the mass is an application of the general rule in lawful confusion.

In Nelson v. Brown[5] wheat was deposited with a warehouse-

[4] 53 Ia. 181.
[5] 44 Ia. 455.

man under a contract for storage, making loss by fire at the owner's risk and allowing wheat of equal test and value, instead of the identical wheat, to be returned. The warehouse was burned, and an action against the warehouseman for the value of the wheat was decided for the defendant. The right to return other wheat, if there were no other provision in the contract, would have made the transaction a sale and the risk would have been on the warehouseman from the time of the deposit; but the clause that the wheat was at owner's risk showed the intention was that title should not pass, and hence it was a bailment and the owner must bear the loss. It follows that whatever the general nature of the transaction, the title will not pass if there is anything showing an express agreement that it shall not pass.

The case, however, seems open to criticism on the point that the right to return other wheat, standing alone, would have made it a sale from the time of deposit. As it was optional with the warehouseman to return other or the identical wheat, the contract really was a bailment until the warehouseman elected to make it a sale by returning other wheat or by putting it out of his power to return the identical wheat, as by selling or mixing it. So, in Ledyard v. Hibbard [6] the court said: "As by the receipt the grain was declared to be at the depositor's risk, for the time being, it must have continued to be at his risk until some act was afterwards done by one party or the other to convert what at first was manifestly a bailment into a sale," thus recognizing that a deposit may constitute a bailment with a power in one party or both to make it a sale.

**§ 27. Wilful confusion.** The law makes a distinction between lawful or accidental (innocent) confusion and wilful or tortious confusion. The good or bad faith in which the mixture is made has a material effect on the right of the respective owners. The general principle usually stated to be the law is that where A tortiously mixes his property with that of B, so that it cannot be separated, title to the whole passes to B. Thus where the plaintiff, claiming title to certain hay belonging to the defendant, in order to be more sure to secure it, mixed it with hay of his own, and the defendant then carried away the whole, and the plaintiff

[6] 48 Mich. 421.

brought trespass for that taking, it was held that the defendant was not liable. As the hay was indistinguishable the defendant had a right to the whole.[7] And where one mortgaged a number of hats, and, being in possession, mixed them with hats of his own, so that the property of each became indistinguishable, and from the mixture sent hats to the defendant, the mortgagee was allowed to recover in trover for all the hats received by the defendant.[8]

§ 28. **Burden of separation on wrongdoer.** The burden rests upon the wrongdoer to make the separation if he wants his property. The injured party is only obliged to exercise good faith. If he has no means of knowing what is his he may take as much as he in good faith believes is necessary to recompense him.

§ 29. **Remedies.** Generally speaking, one may take that to the possession of which he is entitled, if he can do it peaceably. So of the whole mass or of a part thereof, according to the rights in the case.

If the result of the confusion is to create a tenancy in common, each tenant is entitled to possession of the whole. Neither has a right to take the mass from the other. It is, of course, competent for them to make voluntary division of the mass and thus appropriate a definite portion to each. If they cannot agree, on strict principle the only recourse is to a court of equity to have a partition decreed or to have the property sold and the proceeds divided.

### Section 5. Transfer of Title to Personal Property.

§ 30. **Judgments in rem.** Two classes of judgments are recognized, judgments in rem and judgments in personam. The importance of the distinction, with respect to the transfer of title to personal property, lies in the nature of the title conveyed to a purchaser of property sold under one or the other kind of judgment. The principal difference is as to the conclusiveness of the judgment in cutting off the rights of parties interested in the property. A judgment in rem is an adjudication pronounced upon the status of some particular subject matter by a tribunal

[7] Anon., Pop. 38, pl. 2.

[8] Willard v. Rice, 11 Metc. (Mass.) 493.

having competent authority for that purpose.[10] Where the process is to be served on the thing itself, and where the mere possession of the thing itself, by the service of the process and making proclamation, authorizes the court to decide upon it without notice to any individual whatever, it is a proceeding in rem, to which all the world are parties.[11]

A certain ship had been condemned by a French admiralty court as a Dutch ship, France and Holland being then at war. The plaintiff purchased the ship on the sale held under the decree of the admiralty court. The ship was not in fact a Dutch ship but was an English ship. The defendants, servants of the English owner, seized the ship on his behalf. In an action of trover the plaintiff recovered.[12] The proceeding was one in rem and good against the world by the law of nations. In such cases the tribunal has jurisdiction not merely over the rights of the parties, but also over the disposition of the thing itself, and it directs that the thing itself and not merely the interest of a particular party be sold. Hence, all rights of all persons claiming an interest in it are cut off, and a perfect title is conveyed to a purchaser under such a judgment.

**§ 31. Judgments quasi in rem.** There is a class of judgments that appear to be judgments in rem in that they direct the disposition of particular property or determine its ownership, but which are not true judgments in rem because they do not purport to bind any persons except those who have been made parties to the proceeding. Thus, in an action against A the goods of B were attached. B was not a party to the attachment suit. It was held that the attachment did not bind the goods or cut off the rights of B. Although the attachment proceedings are called in rem, the attaching creditor can acquire through his attachment, no higher or better rights to the property or assets attached than the defendant had when the attachment took place.[13] In such cases if the property is sold, the purchaser acquires no other or better title than the defendant had.

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[10] Woodruff v. Taylor, 20 Vt. 65.
[11] Mankin v. Chandler, Fed. Cas. No. 9030.
[12] Hughes v. Cornelius, 2 Show. 232.
[13] Samuel v. Agnew, 80 Ill. 553.

**§ 32. Judgments in personam.—Execution sales.** A judgment in personam is one which operates only upon those who have been duly made parties to the record and others having the same interest, being against a person merely, and not settling the status of any person or thing. The ordinary case of a judgment for damages, rendered in an action on a debt or for damages for a tort, is an example of a judgment in personam. It is simply an adjudication that A recover from B such a sum of money and have execution therefor. By virtue of the judgment a writ of execution issues, and under the authorization of the writ the sheriff seizes personal property of the judgment debtor and sells it at public auction sale and out of the proceeds pays the judgment.

The defendant was owner of a shearing machine and let it for hire to one Freeman. While in Freeman's possession the machine was seized by the sheriff as Freeman's property by virtue of an execution against him and was sold at sheriff's sale. The purchaser later sold the machine to the plaintiff. The defendant took the machine from the plaintiff's possession, and the latter brought trespass. The court held for the defendant on the ground that a sheriff's sale on execution can convey no greater title than the debtor had in the property sold.[14] In such cases the sheriff sells only the interest of the debtor in the property. The property is sold, not like property sold under a judgment or decree in rem which directs the sale of the specific thing and which judgment is binding upon everybody, but by virtue of a judgment against an individual merely for a sum of money and a writ which authorizes the sheriff to sell the debtor's property and his only. If he seizes the property of another he is not protected by his writ and is merely a trespasser. A purchaser at such a sheriff's sale should therefore first satisfy himself as to the sheriff's right to sell.

**§ 33. Effect of statute in passing title.** If one has a right of action against another for the recovery of personal property or for damages for the converting of it or injury to it, he may lose that right of action by lapse of time. Wherever our system of law has prevailed, it has been deemed to be in the interest of

[14] Griffith v. Fowler, 18 Vt. 390.

public policy to place an arbitrary limit by statute upon the period within which such actions can be brought. Statutes known as statutes of limitation have, accordingly, been passed which generally provide, in substance, that no such actions shall be maintained unless brought within a certain period after the right of action first accrued. The period varies in different jurisdictions. It will be observed that, in form, such a statute merely prevents the bringing of the action, i. e., bars the remedy, and says nothing about a change of title.

The question arises, what is the effect upon the title where A has converted B's property and retains possession of it for the statutory period. If B still has the title after the expiration of the period, the statute merely prevents his bringing an action for the property and he can re-invest himself with complete ownership if he can regain possession. The weight of authority is in favor of the proposition that, where one has had the peaceable, undisturbed, open possession of real or personal property, with an assertion of his ownership, for the period which, under the law, would bar an action for its recovery by the real owner, the former has acquired a good title—a title superior to that of the latter, whose neglect to avail himself of his legal rights has lost him his title.[15]

### Section 6. Title by Gift of Chattel.

**§ 34. Delivery of gift generally necessary.** Ordinarily no gift or grant of a chattel is effectual to pass it, whether by parol or by deed, and, whether with or without consideration, unless accompanied by delivery. To this rule there are two exceptions, one in the case of a gift by deed and the other in the case of a contract of sale.

**§ 35. Gift by deed under seal.** It is generally held that a gift by deed under seal is good without delivery of the chattel.

**§ 36. Other methods.** The transfer of the title to personal property by sale, mortgage, bankruptcy, and so forth, is treated in the articles on Sales, Mortgages, and Bankruptcy, elsewhere in this book.

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[15] Campbell v. Holt, 115 U. S. 620.

## Section 7. Common Law Liens.

**§ 37. Lien defined.** A lien at common law is a right to retain possession of property belonging to another until a claim of the party in possession against the owner is satisfied.[1] A lien may be given by contract, express or implied, or it may be given by the common law without any agreement. It is the latter class of liens that we consider in this section.

**§ 38. Bailment defined.** The term bailment frequently occurs in the cases relating to liens. It may be shortly defined as the holding possession of another's personal property in trust for some specific purpose.[2] The bailee is the one who has possession. The bailor is he who has given the bailee possession. See § 25 above.

**§ 39. Lien for labor in improving chattel.** Plaintiff had possession of a race horse belonging to A, which plaintiff had trained. While in plaintiff's possession the horse was sold to the defendant, and plaintiff gave up possession of the horse to defendant under an agreement by defendant to pay for the training in consideration of the abandonment by plaintiff of his lien. In an action to recover the cost of the training, the defendant contended that there had been no lien and that plaintiff's detention of the horse was altogether wrongful, but the court said: "On the principle of the common law, that where the bailee expends labor and skill in the improvement of the subject delivered to him, he has a lien for his charge, I think the trainer has a lien for the expense and skill bestowed in bringing the horse into condition to run at races."[3] But where the plaintiff delivered a horse to the defendant to be stabled and in an action of detinue brought by the plaintiff for the horse the defendant claimed the right to hold the horse by virtue of a lien for his charges, it was held that the defendant had no lien because he had done nothing for the benefit and improvement of the horse.[4]

These two cases show that the test of the existence of the lien

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[1] Lawson on Bailments, § 26.
[2] Lawson on Bailments, § 5.
[3] Bevan v. Waters, Mood. & M. 235.
[4] Judson v. Etheridge, 1 Cr. & M. 743.

is whether the bailee has done something to the chattel to improve it by his skill and labor.

So, where the defendant pastured cows for the plaintiff, who came and took them and the defendant retook them, for which the plaintiff brought trespass, and the defendant justified his act by virtue of a lien for pasturing, it was held for the plaintiff that there was no lien, on the ground that no additional value was conferred on the article by the skill of the bailee.[5] And it is the law that an agister has no lien unless allowed one by statute.[6]

§ 40. **Express or implied contract for services.** In Chase v. Westmore[7] the question of the effect upon the lien of an express agreement as to compensation for the work done upon the property was considered. The defendants, who were millers, had ground grain for certain bankrupts, of whom the plaintiffs were assignees, on an express agreement as to the price. The grinding was all done under one bargain. No time or mode of payment was set, but there was an express agreement that so much per load should be paid. The grain was ground in various parcels at different times. At the time of the bankruptcy the defendants had a portion of the grain on hand, and claimed to hold it on a lien for the value of the whole grinding. In trover, it was held for the defendants that they have the lien claimed. The principal question made in the case was whether an express agreement as to the price destroys the right to a common law lien for the value of work expended on an article, and the case established

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[5] Jackson v. Cummings, 5 M. & W. 342.

[6] The refusal to allow an agister a lien seems to have arisen through a misunderstanding of the law. The question of an agister's lien was first raised in Chapman v. Allen, Cro. Car. 271, in 1632. At that time a lien was not allowed when there was an express contract for remuneration, and, as in Chapman v. Allen there was an express contract, the lien was not allowed in that case. Later, the lien was allowed in cases of express contract, and in Jackson v. Cummings the judges seem not to have understood the real ground of the decision in Chapman v. Allen, but followed that case and held that there was no lien because the bailee did not improve the chattel. See 2 Harvard Law Review, p. 61.

[7] 5 M. & S. 180.

the law that such an agreement does not destroy the right to the lien and it exists whether the contract is express or implied.[8]

If, however, a tailor, for example, should make a suit from cloth belonging to a customer under an agreement that the suit should be delivered and the customer have time thereafter in which to pay for it, the tailor would be deemed to have waived his right to a lien and would have none. The provision in the contract for delivery before payment is inconsistent with the existence of the lien. In Chase v. Westmore the court said: "And we agree that where the parties contract for a particular time or mode of payment the workman has not a right to set up a claim to the possession inconsistent with the terms of his contract."

**§ 41. Lien by custom of trade.** If a principal delivers goods to his factor to be sold, or if the factor purchases goods for his principal, in either case the factor has a lien on the goods for his charges.[9]

In an early case [10] the court held that a wharfinger had a lien and said that liens were either by the common law, usage or agreement; that a lien from usage was matter of evidence; that the usage in the present case had been proved so often it should be considered as a settled point that wharfingers had the lien contended for. That is the true basis of this class of liens. The bailee does nothing to improve the property and by the common law test would have no lien, but where the custom has been proved and recognized by the courts it is established as law that the lien exists. The liens of factors and warehousemen are well established in the United States.

**§ 42. Lien where bailee bound to receive the goods.** A car-

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[8] The true origin of the common law lien seems to have been that at the early period before there was any action allowed on an implied contract for services, the lien was allowed as the bailee's only means of enforcing payment. So the lien became established in cases where there was no express contract. When there was an express contract the bailee had an action and hence, originally, no lien. When Chase v. Westmore was decided there was an action on an implied contract. The court did not understand the true origin of the lien and could see no reason for a distinction between express and implied contracts.

[9] See Bryce v. Brooks, 26 Wend. 367.

[10] 1 Esp. 109.

rier may retain the goods for his charges. By the common law an innkeeper is entitled to a lien for the amount of his charges on all the goods of his guest which are found in the inn.[11] The usual explanation of both the carrier's and the innkeeper's liens is that wherever the law compels one to receive the goods of another the bailee is given a lien to secure his charges.

**§ 43. Specific liens.** An ordinary common law lien for work put upon the property of another is specific, i. e., for the charges for services on that article and nothing else. Thus, if A has repaired a pair of shoes for B and delivered them to B without being paid for them and, later, on another contract repairs another pair, A does not have a lien on the second pair for his charges on the first, either alone or together with the charges on the second pair itself, nor for any claim that he may have against B except the charges on the second pair.

Where, however, a quantity of logs were delivered on different days at the defendant's saw mill, under one contract to saw the whole quantity into boards, and the defendant sawed a part of them and delivered the boards to the bailor without being paid for the service, it was held that he had a lien for the amount of his account upon the residue of the logs in his possession.[12] Here the sawing was an entire transaction, and the lien of the bailee for his whole compensation extended to every portion of the logs. The lien, however, was restricted to claims arising under that contract, and the defendant would have no right to retain any part of the logs to secure payment of claims arising from other transactions with the plaintiff.

It is the law that a common carrier has only a specific lien.

In another case[13] the plaintiff's horses, wagonette, and harness were held by the defendant under an innkeeper's lien. Plaintiff tendered the amount due for the keep of the horses and demanded that they be given up to him. The court held that he must pay, not only for the keep of the horses but also for the entertainment of the guest who had brought them. The lien is

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[11] Beale, Innkeepers and Hotels, §§ 251, 252.

[12] Morgan v. Congdon, 4 N. Y. 552.

[13] 3 Q. B. Div. 484.

on any part or all of the property for the expense of the keep of the property and of the guest. There is one contract, one debt, and one lien in respect to the whole of the charges. It is not a general lien, but like a common law lien on part of several articles for charges for improving all, where all the work is done under one contract.

§ 44. **General liens.** An exception to the rule of the preceding sub-section is found in the case of factors, and it is now well settled that a factor has a lien and may retain for a general balance, including responsibilities incurred in the execution of his agency.

§ 45. **No lien for detention charges.** The law gives a bailee holding a chattel on a lien no right to charge for the expense of keeping it or any lien therefor. There can be no implied promise on the part of the owner of the chattel to pay for it when it is being kept against his will.

§ 45a. **Innkeeper's lien.** An innkeeper has a lien on property brought to the inn by a guest even if the property does not belong to the guest, because the innkeeper is compelled to receive the guest. The lien is on every part of the property for the entire charges in respect to both guest and property.[14]

Even when the innkeeper knows that the goods do not belong to the guest, it is now clear law that he has the lien notwithstanding his knowledge as to the ownership if he receives the property as being baggage of the guest. Furthermore, the lien exists even if the property is of a kind that the innkeeper is not obliged to receive if he, in fact, does receive it as baggage of the guest.

§ 46. **Carrier's lien.** If A, being in possession of the goods of B, wrongfully and without the consent of B, express or implied, ships them by a common carrier, who acts in good faith supposing A to be the owner of the goods or to have authority to ship them, and then B demands the goods, there is a question whether the carrier has a lien on the goods for the freight charges. The weight of American authority is that a carrier is subject to the same obligation to inform himself of the title of those with whom he deals as are other persons and because he

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[14] See Mulliner v. Florence, § 43, above. In this case the property was left at the inn by a guest who was not the owner of it.

can protect himself by demanding payment of the freight in advance, he does not in such cases have a lien.

**§ 47. Lien of livery stable keeper.** Unless also an innkeeper and receiving a horse in his capacity as such for a guest, a livery stable keeper would not at common law have a lien on a horse boarded with him. But statutes giving such liens are not uncommon.

## Section 8. Pledge.

**§ 48. Nature of a pledge.** A pledge or pawn is the bailment of a chattel as security for the payment of some debt or the performance of some engagement. The bailee has a lien on the pledged property, given him by the contract.[1] Upon payment of the debt or performance of the engagement for which the pledge was made he is to return the identical property to the pledgor. If the pledgor makes default in payment or performance, the pledgee's remedy is to sell the pledged property, and the contract of pledge gives the pledgee power to do so, wherein the pledgee differs from the bailee under a common law lien. The usual practice is to sell at public auction after notice. If the sale is made in such manner, honestly and fairly, the pledgee is not liable for a loss that may ensue to the owner from the property realizing less than its estimated value. If he sells without notice, it seems he would be charged with the full value of the property.[2] Or, the pledgee may foreclose his lien by a bill in equity. Any surplus realized upon the sale is to be paid over to the pledgor.

**§ 49. Effect of transfer by pledgee.** The English law is that until payment or tender of the amount of the debt to secure which the pledge was made, the pledgee has the whole present interest and right of possession; that his interest is greater than that of a bailee under a common law lien; that interest is not destroyed by his transfer of the property by way of repledge or sale before default; that such repledge or sale is not a conversion and that the pledgor cannot on account thereof bring trover or an

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[1] For the distinction between a pledge and a chattel mortgage, see Chapter VI, Chattel Mortgages, § 2.

[2] Stearns v. Marsh, 4 Den. 227.

action to recover the specific property before tender of the amount of the original debt.

The American law is unsettled. Some of the cases adopt the English view that the pledgor is not entitled to a return of the property or an action for damages without making a tender, although the pledgee may have sold or repledged the property for a greater amount than the original debt.[3] Others take the position that if the pledgee tortiously sells the pledged property, the pledgor may bring trover without a tender.[4]

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[3] See Cummock v. Newburyport Savings Institution, 142 Mass. 342.

[4] Stearns v. Marsh, 4 Den. 227.

## CHAPTER V.

## SALES OF PERSONAL PROPERTY.

**§ 1. Introduction. The Sales Act.** The principles of the law of sales are technical and can best be presented in the form of specific rules. Commissioners for uniform state laws have been appointed by nearly every state in the Union for the purpose of bringing about, so far as possible, uniformity of law in the United States. The Sales Act, drafted at the instance and under the supervision of these commissioners, was adopted in 1906 and recommended for passage. It has since been enacted by the following states and territories: Alabama (1931), Alaska (1913), Arizona (1913), California (1931), Canal Zone (1934), Connecticut (1907), Delaware (1933), District of Columbia (1937), Hawaii (1929), Idaho (1919), Illinois (1915), Indiana (1929), Iowa (1919), Kentucky (1928), Maine (1923), Maryland (1910), Massachusetts (1908), Michigan (1913), Minnesota (1917), Nebraska (1921), Nevada (1915), New Hampshire (1923), New Jersey (1907), New York (1911), North Dakota (1917), Ohio (1908), Oregon (1919), Pennsylvania (1916), Rhode Island (1908), South Dakota (1921), Tennessee (1919), Utah (1917), Vermont (1921), Washington, Wisconsin (1911), Wyoming (1917). It is probable that it will be enacted in the remaining states within a few years. It is chiefly a codification of existing law.

This article will follow the classification of the Sales Act, and the principles of the law of sales will be stated in the language of that Act, with such explanations and illustrations as seem advisable and as space permits. The captions of the sections and many of the sub-sections of this article are taken from the statute as passed in Rhode Island.

### Section 1. Formation of the Contract.

**§ 2. Contracts to sell and sales.** "A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price. A sale of

goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price."[1]

It is important at the outset to understand the distinction between a contract to sell and a sale, a distinction that must always be kept in mind, in studying the subject of the law of sales. A contract to sell transfers no interest in the property which is the subject of the sale, but gives only a right in personam against the other contracting party. A sale transfers the property in the goods to the buyer. It produces a right in rem, a right in the property, good against all the world. The distinction is sometimes expressed as one between an executory and an executed contract of sale. "A contract to sell, that is, in future, is no more a sale than a contract to marry is a marriage."[2] If, according to the contract, the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, there is a contract to sell; but if the transfer of the property in the goods is to take place at the time of the transaction, there is a sale. If this distinction is kept constantly in mind, the principles of the law of sales and the cases will be easily understood. The term "contract of sale" is ambiguous and includes both a contract to sell and a sale.

**§ 3. Contracts of sale are simple contracts.** A sale being a contract, all the elementary principles of the law of contracts are applicable to a contract of sale, whether it be a contract to sell or a sale. There must be offer and acceptance, mutual assent, consideration, and freedom from misrepresentation, fraud, duress, undue influence, and illegality, to the same extent as in any other contract. All of these matters are fully discussed in Chapter I.

**§ 4. Absolute and conditional contracts to sell and sales. Conditions precedent.** "A contract to sell or a sale may be absolute or conditional."[3]

In a contract to sell or in a sale there may be expressed or implied conditions, the most common being that the property (title) shall not pass until the price is paid. The goods are de-

[1] Sales Act, sec. 1.
[2] Gillette, J., in Still v. Cannon, 13 Okl. 491.
[3] Sales Act, sec. 1.

livered to the buyer, but the property in the goods is retained by the seller until they are paid for. The condition may be a condition precedent or a condition subsequent. If it be a condition precedent, the condition must be performed before the property in the goods passes to the buyer. Often there is a contract of sale of specific goods to which something remains to be done. When anything remains to be done to the goods, by the seller, for the purpose of ascertaining the price, as by weighing, measuring or testing the goods, the doing of such thing is a condition precedent to the transfer of the property, unless it is clear that the parties intend that the property in the goods shall pass at once.

**§ 5. Conditions subsequent.** If it be a condition subsequent, the property in the goods has already passed to the buyer, but subject to being divested on the performance of the condition; e. g., a sale and delivery of goods to the buyer on condition that they may be returned within a certain time and the money refunded, if the buyer decides not to keep them. The performance of the condition subsequent here revests the title at once in the seller, irrespective of his consent at that time.[4]

**§ 6. Sales between part owners.** "There may be a contract to sell or a sale between one part owner and another."[5] That is, one joint owner of goods may sell his interest therein to another joint owner or to a third person.

**§ 7. Capacity: Married women, infants, insane persons, and drunkards.** "Capacity to buy and sell is regulated by the general law concerning capacity to contract and to transfer and acquire property."[6]

The same rules and limitations in respect to the parties capable of entering into any simple contract are applicable to a contract of sale. Under the modern statutes in every state, a married woman may make purchases and sales the same as if she were unmarried, and in several states she may contract directly with her husband, thus allowing sales of personal property directly between a husband and wife.

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[4] Gay v. Dare, 103 Cal. 454.
[5] Sales Act, sec. 1.
[6] Sales Act, sec. 2

The purchases and sales of an infant, i. e., a person who has not yet reached his legal majority, generally twenty-one years of age, are not absolutely void, but voidable only. Contracts of sale entered into by an infant, whether he be the buyer or the seller, are voidable at his election, and cannot be enforced against him, against his will, except for necessaries.

As a general rule, the contracts of an insane person are voidable, although they are held in some states to be absolutely void.

Purchases and sales made by a person while under the influence of liquor are voidable, if the degree of intoxication is such as to render the person incapable of understanding the nature of the transaction into which he has entered. They may be avoided within a reasonable time after becoming sober, or may be ratified.

For the effect of the Sales Act upon the doctrine of this subsection, see § 64, below.

**§ 8. Liability for necessaries.** "Where necessaries are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor. Necessaries in this section mean goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of delivery."[7]

The liability of an infant to pay for necessaries is not a liability upon the contract into which he has entered and under which the goods have been sold to him, but his liability is upon a contract implied in law for the value of the necessaries, i. e., to the extent that he has been benefited by what he has received. The price agreed upon in the transaction is not taken as the measure of the infant's liability, but, at the most, is only evidence of the value of the goods received.

Whether, in any case, the goods are necessaries or not is a question to be determined according to the circumstances of the individual case. The question to be determined is: are the goods suitable to the condition in life of such infant and to his actual requirements at the time he receives the goods? A saddle horse

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[7] Sales Act, sec. 2

might be considered a necessary for the son of a nobleman, where horseback riding has been prescribed by his physician, while a cheap set of golf sticks would perhaps be considered a luxury for the son of a peasant, even though he were told by the doctor to get all the outdoor exercise he could and golf playing were thought to be the best kind. If the infant is already supplied with a sufficient number of the articles purchased, any additional articles of the same sort cannot be regarded as necessaries, and he cannot be held liable for their purchase price or value. In any event, he can be held liable only for an amount sufficient for his immediate needs. While an infant can become bound for the value of necessaries purchased by him, he cannot be held liable in any way upon a contract to purchase them. Where an infant purchases necessaries and the delivery is to be made in installments, he can become liable only for the goods actually received by him, and not for later installments after he has declined to receive any more goods.

An insane person is liable for necessaries; and the same rules apply as to what may be considered to be necessaries.[8] A person is liable for necessaries purchased while intoxicated, to the same extent and upon the same principles as in the case of an insane person.[9]

### Section 2. Formalities of the Contract.

**§ 9. Form of contract or sale.** "Subject to the provisions of this act and of any statute in that behalf, a contract to sell or a sale may be made in writing (either with or without seal) or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from the conduct of the parties."[1]

A form of a bill of sale is found on the opposite page.

Where the contract is in writing, it must be proved by the writing, and the evidence furnished by the writing cannot be varied by parol, under the so-called "parol evidence rule." See Contracts, Chapter I, § 76.

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[8] Larue v. Gilkyson, 10 Pa. St., 375; Sceva v. True, 53 N. H. 627.

[9] Van Horn v. Hann, 39 N. J. Law, 207.

[1] Sales Act, sec. 3.

BILL OF SALE.

KNOW ALL MEN BY THESE PRESENTS, that *William Stone*, of the *City of Chicago*, in the County of *Cook* and State of *Illinois*, party of the first part, for and in consideration of the sum of *One Thousand* Dollars, lawful money of the United States of America, to *him* in hand paid, at or before the ensealing and delivery of these Presents, by *Richard Lake*, party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, and delivered, and, by these Presents, does grant, bargain, sell, and deliver, unto the said party of the second part, all the following GOODS, CHATTELS, and PROPERTY, to wit: *Two bay horses, weight about fifteen hundred pounds each; one gray horse, weight about one thousand pounds; one wagon; three sets of harness.*

TO HAVE AND TO HOLD the said goods, chattels, and property unto the said party of the second part, *his* heirs, executors, administrators, and assigns, to and for *his* own proper use and behoof, forever.

And the said party of the first part does vouch *himself* to be the true and lawful owner of the said goods, chattels, and property, and to have in *himself* full power, good right, and lawful authority, to dispose of the said goods, chattels, and property, in manner, as aforesaid: And *he* does, for *himself*, *his* heirs, executors, and administrators, covenant and agree to and with the said party of the second part, to Warrant and Defend the said goods, chattels, and property to the said party of the second part, *his* heirs, executors, administrators, and assigns against the lawful claims and demands of all and every person and persons whomsoever.

IN WITNESS WHEREOF, *I* have hereunto set *my* hand and seal the *fifteenth* day of *October* in the year one thousand nine hundred and *thirty-seven.*

*(Signed) William Stone.* [SEAL]

Signed, Sealed and Delivered
in the Presence of
*(Signed) Sarah Camp.*

**§ 10. The statute of frauds.** The seventeenth section of the statute, 29 Charles II, c. 3, enacted in the year 1676, and entitled "An act for the prevention of frauds and perjuries," required that contracts of certain kinds—in contracts of sale those above a certain amount—should be evidenced by writing, signed by the parties to be charged, and not proven by the mere statements of witnesses depending upon their memories, and open to temptations to commit fraud and perjury. Statutes, the general effects

of which are the same as this English statute, have been enacted in all the states of the United States of America except these: Rhode Island, Pennsylvania, Delaware, Virginia, West Virginia, North Carolina, Louisiana, Texas, and Kansas. See Sections 1 and 11.

**§ 11. Same: Sales Act.** The general effect of the provision of the Sales Act is the same, although the wording is somewhat changed. The provision is as follows: "Statute of Frauds. 1. A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf. 2. The provisions of this section apply to every such contract of sale, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply. 3. There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods." [2]

In the United States, the language of the statute of frauds was construed to include executory as well as executed sales. The language of the Sales Act, "A contract to sell or a sale," is clear, including executory as well as executed sales.

**§ 12. Sales and contracts for work and labor: English rule.** A contract for work and labor is not within the statute of frauds; that is, it is not necessary that it be in writing in order to be

[2] Sales Act, sec. 4.

valid. It is often a close question whether a contract is a contract of sale or a contract for work and labor. The English rule, as stated in a leading case is: "If the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labor; but if the result of the contract is that the party has done work and labor which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered." Probably the only state in the Union which follows the English rule is Missouri.[3]

**§ 13. Same: Massachusetts rule.** Generally in the United States, one or the other of two rules is followed, viz., what may be called the Massachusetts and the New York rules. Under the Massachusetts rule, a contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But, on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute. The Sales Act, in effect, adopts this rule.

The Massachusetts rule is followed in New England (except in Vermont, where the rule seems unsettled), New Jersey, New York, Alabama, Georgia, Michigan, Indiana, Wisconsin, Minnesota, Wyoming, New Mexico, Washington, and California. The provision in the Sales Act is framed in accordance with this rule.

**§ 14. Same: New York rule.** Under the New York rule, as laid down in Parsons v. Loucks,[4] which is followed in South Carolina, but no longer in New York, "a distinction is drawn between the sale of goods in existence at the time of making the contract, and an agreement to manufacture goods. The former is within the prohibition of the statute, and void unless it is in writing, or there has been a delivery of a portion of the goods sold or a payment of the purchase price. The latter is not."

The New York rule is, that "an agreement for the sale of

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[3] Pratt v. Miller, 109 Mo., 78. But see Brown v. Sanborn, 21 Minn., 402.
[4] 48 N. Y. 17.

any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered, such as flour from wheat not yet ground, or nails to be made from iron belonging to the manufacturer, is not a contract of sale. The New York rule lays stress on the word 'sale.' There must be a sale at the time the contract is made. The contrast between Parsons v. Loucks and the leading English case is, that in the former case, the word 'sale' refers to the time of entering into the contract, while in the latter, reference is had to the time of the delivery, as contemplated by the parties. If at that time it is a chattel it is enough, according to the English rule."[5] The real test in the New York rule is the existence or non-existence of the chattel at the time the contract is made. If the chattel is not in existence at the time that the contract is made, it is a contract for work and labor, and not a sale. If the chattel is in existence, then it is a sale.

§ 15. **"Goods, wares, and merchandises."**[5a] It is often difficult to determine just what constitutes "goods." An important distinction is between real and personal property.

§ 16. **Growing crops and timber. Fructus industriales and fructus naturales.** A sale of growing crops which must be planted annually, fructus industriales, is everywhere held to be a sale of personal property.[6] There is not the same uniformity in respect to the natural products of the soil, such as timber, fructus naturales. It is generally held that if, by the terms of the contract, they are to be severed from the soil within a reasonable time, they are to be considered personal property, and hence goods; while, if they are to remain affixed to the soil they are to be considered as an interest in land.

A contract for the sale of minerals, building materials, and fixtures is governed by the same principles as a contract for a sale of fructus naturales.

§ 17. **Miscellaneous property. Choses in action. Sales Act.** Buildings erected upon leased land, with no intent that they

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[5] Dwight, C., in Cooke v. Millard, 65 N. Y. 352.

[5a] These words are quoted from the English statute, and are also used in most of the American statutes.

[6] Evans v. Roberts, 5 B. & C., 829.

shall become a part of the realty, are personal property and may be removed or sold by the tenant, as personal property. Water, separated or to be separated from a stream or lake, and ice are personal property.[7]

Bonds, shares of stock, mortgages, bills and notes have been held to be within the statute. The Sales Act expressly includes all choses in action. A sale by a partner of his interest in the firm need not be in writing.[8] An agreement to form a mercantile partnership is valid when made by parol.

**§ 18. "Of the value of five hundred dollars or upwards."** The word "price" in the English statute has been construed as the equivalent of "value;" so contracts of exchange or barter have been held to be within the statute. In the Sales Act, the word "value" is used. The amount, however, though generally fifty dollars, about the equivalent of the amount in the English statute, varies from thirty to two hundred dollars. In Florida and Iowa no limit is fixed. Five hundred dollars is fixed by the Sales Act, and that is the amount fixed in the act as passed in Arizona, New Jersey, Massachusetts and Rhode Island. In Connecticut the amount has been fixed at one hundred dollars, and in Ohio at twenty-five hundred. It is not likely that the amount adopted will ever become uniform in the several states.

Where several articles are bought at the same time, or under one contract, the price of each article being less than the limit fixed by the statute, but the total sum being greater, the contract is within the statute.[9] So also where the price of the goods is above the limit fixed and the contract includes an undertaking to do or furnish something else. It may be that the value or price of the goods is not known at the time the contract is entered into, but is to be determined by the weight or measure of the goods. If the price, when ascertained, is found to be above the limit fixed, the contract is within the statute, and not valid if not in writing.[10] Where goods were ordered at one time, some

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[7] Jersey City v. Harrison, 72 N. J. Law, 185; Higgins v. Kusterer, 41 Mich., 318.

[8] Victor v. Vieths, 60 Mo. App., 9.

[9] Baldey v. Parker, 2 B. & C., 37; Allard v. Greasert, 61 N. Y., 1.

[10] Watts v. Friend, 10 B. & C., 446.

of which were manufactured, and others not, it was held that the contract was entire for all the goods, and that the delivery and acceptance of the manufactured articles took the case out of the statute as to all.[11]

**§ 19. Unless the buyer shall accept part of the goods so sold, and actually receive the same: Acceptance.** There must be both an acceptance and an actual receipt of the goods by the buyer, or by his authorized agent. Either may precede the other, but both must exist in order to satisfy the statute.

An acceptance is an assent by the buyer, either before or after delivery, to becoming the owner of those specific goods (§ 11, clause 3, above). It must be absolute and not conditional. A mere delivery of the goods, or a part of the goods, is not sufficient.

Detention of the goods for an unreasonable time by the purchaser is evidence of an acceptance by him.[12]

**§ 20. Same: Receipt.** Actual receipt means the acquisition of possession by the buyer or his agent. A number of states hold that to constitute such actual receipt there must be something more than mere words.

Where the goods are ponderous and incapable of being handed from one to another, as a stack of hay, there need not be an actual delivery; but it may be done by that which is tantamount, such as the delivery of the key of a warehouse in which the goods are lodged, or by the delivery of other indicia of property.[13] The receipt of a mere sample, not taken from the goods sold, is not sufficient.

There must be a change of possession. As long as the seller retains possession or a lien on the goods, there can be no receipt by the purchaser. Where the goods are in the possession of a warehouseman, there can be no actual receipt of the goods until the warehouseman accepts the order for delivery to the purchaser and assents to holding the goods for him.[14]

**§ 21. Some note or memorandum in writing of the contract**

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[11] Scott v. Eastern Counties Railway Co., 12 M. & W., 33.
[12] Parker v. Wallis, 5 E. & B., 21.
[13] Chaplin v. Rogers, 1 East., 192.
[14] Bentall v. Burn, 3 B. & C., 423.

or sale must be signed by the party to be charged, or his agent in that behalf. A "note or memorandum" is all that is required. A formal contract or bill of sale is not necessary to satisfy the statute. "The party to be charged" is the party against whom enforcement of the contract or recovery is sought. If one party has signed the memorandum, the contract can be enforced against him, though not against the other.

**§ 22. Verbal alteration of contract. Contents of memorandum.** A contract for the sale of goods once made and the statute complied with cannot be varied by a verbal agreement which changes its terms, as an extension of the time of delivery. A new contract is not made, since the statute is not complied with by the requisite note or memorandum, and the old contract was not intended to be rescinded by a new one which is invalid.[15] An oral rescission of the whole contract, intended as such, however, is valid.[16]

The memorandum must contain the names of both the buyer and the seller.[17] The memorandum must be sufficient to show the material terms of the bargain, including generally a description of the goods sold, sufficient to identify them with certainty, the parties to the transaction and the price. In a large number of the states, probably a majority, the consideration must be stated.

**§ 23. Signing memorandum by agents.** The agent must be some third party, and cannot be the other contracting party.[18] One agent, however, may act for both parties. An auctioneer, while he is the agent of the seller in accepting bids and thus completing the contract, may act as the agent of the buyer in signing the memorandum required by the statute of frauds. Where the parties to the contract deal through a broker and know that he is acting in his capacity as such, he has authority to bind them

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[15] Noble v. Ward, L. R., 2 Exch., 135.

[16] Goss v. Lord Nugent, 5 B. & Ad. 58, 66.

[17] Champion v. Plummer, 1 New Rep., 252; Grafton v. Cummings, 99 U. S., 100.

[18] Wright v. Dannah, 2 Campbell, 203.

both by making a memorandum of the contract in writing, and signing it in their behalf respectively.[19]

### Section 3. Subject-Matter of Contract. Price.

**§ 24. Sale of future goods: Seller with potential interest.** In order to have a valid sale of goods, in which case the title to the goods passes to the buyer, the subject-matter of the sale must be in existence and owned by the seller. One cannot sell goods in which one has no property interest at the time of the sale. One may sell goods in which one has a potential interest, that is, a present interest in the property of which the thing sold is the product or growth or increase; thus, a man may sell the wool to be grown upon his own sheep, or the crops to be grown upon his own land, or the offspring of animals of which he is the present owner; but not the wool to be grown upon the sheep of another; or the crops to be grown upon land in which he has no present interest; or the offspring of animals which he does not own.

In the case of a sale of goods having a potential existence, the property vests in the buyer as soon as it comes into existence, without any act on the part of either the buyer or the seller.

**§ 25. Same: Seller with no interest.** The seller, at the time of the sale, must have an interest, actual or potential, in the thing sold. A mere possibility and expectancy, coupled with no present interest, is not sufficient. Fish to be caught are not the subject of sale.

The owner of land may sell or mortgage a crop to be grown thereon,[1] although in some states a sale or mortgage is not valid unless the crop has been planted. In Nebraska, the rule is in doubt, the cases being confused.[2]

**§ 26. Future sales in equity.** While, at law, property in which the seller has no present interest can not be sold so as to pass any property to the purchaser until he actually takes possession, an assignment may be made to which effect will be given in equity. The moment the property comes into existence, or is acquired by the assignor, the assignment takes effect upon it.

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[19] Coddington v. Goddard, 16 Gray, 436.

[1] Dickey v. Waldo, 97 Mich., 255; 23 L. R. A., 449, and note.

[2] Brown v. Neilson, 61 Neb., 765; Sporer v. McDermott, 69 Neb., 533.

This rule, that the equitable interest in the goods passes to the purchaser upon the acquisition of the goods by the seller, is followed by a majority of the decisions in this country,[3] but there are many cases contra,[4] holding especially that a sale of goods is not valid against creditors unless possession is taken.

**§ 27. Contract to sell future goods.** There is nothing illegal at common law about a contract to sell goods afterwards to be acquired by the seller. It is a contract, however, that may easily be a subject of gambling, and such a contract is illegal as a gambling contract where the parties do not intend that it shall ever be carried out, but intend merely that it shall be broken, and that the difference between the contract price and the market price of the goods, at the time of delivery, shall be paid. A contract for the sale of goods which the seller is to acquire by purchase is a valid contract if the parties act in good faith, or if one of the parties acts in good faith.

**§ 28. Sale of undivided shares of goods.** "There may be a contract to sell or a sale of an undivided share of goods. If the parties intend to effect a present sale, the buyer, by force of the agreement, becomes an owner in common with the owner or owners of the remaining shares."[5]

A tenant in common of goods may sell his interest therein to a co-tenant or a third person. The buyer becomes a tenant in common with the other owners. The goods are at the risk of all the co-owners in proportion to their interests therein.

"In the case of fungible goods, there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite number, weight, or measure of the goods in the mass, and though the number, weight, or measure of the goods in the mass is undetermined. By such a sale the buyer becomes owner in common of such a share of the mass as the number, weight, or measure bought bears to the number, weight, or measure of the mass. If the mass contains less than the number, weight or measure bought,

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[3] See especially: Mitchell v. Winslow, 2 Story, 630; Kribbs v. Alford 120 N. Y., 519; Lundlum v. Rothschild, 41 Minn., 218.

[4] Blanchard v. Cooke, 144 Mass 207.

[5] Sales Act. sec. 6.

the buyer becomes the owner of the whole mass and the seller is bound to make good the deficiency from similar goods unless a contrary intent appears."[6]

By "fungible" goods is meant goods of such a nature that they may be replaced by other goods of equal quantity and quality; such as grain, coal, and wine. The term is defined by the Sales Act as follows: " 'Fungible goods' means goods of which any unit is from its nature or by mercantile usage treated as the equivalent of any other unit."[7] All of the holders of receipts of grain stored in an elevator are tenants in common of the grain therein, in the proportion that the receipts of each bear to the total of the receipts outstanding. The sale of a certain quantity out of an undetermined mass transfers the property in that quantity. A part of the mass may be sold without actual separation, where the mass is ascertained and all parts are of the same value and undistinguished from one another.

**§ 29. Destruction of goods: Sale.** In a sale of goods, obviously the existence of the goods is essential to the performance of the contract; and where the goods without the knowledge of the seller have wholly perished at the time when the agreement is made,[8] performance of the contract has become impossible, and the contract is discharged.[9] The seller is excused from delivery of the goods, owing to impossibility, through no fault of his; and the buyer is excused from paying the price, through failure of consideration. And both the buyer and seller are excused from performance, or liability for non-performance, on the ground of mutual mistake.

Where the goods are partly destroyed, it is impossible for the seller to fulfill his contract, and, if without his fault, he is excused on the ground of impossibility. The buyer has the option of accepting the goods that remain, upon paying the proportionate part of the price. The same is true where the goods are inferior in quality to that supposed by the parties.

**§ 30. Same: Contract to sell.** Where, instead of a sale,

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[6] Sales Act, sec. 6.
[7] Sales Act, sec. 76.
[8] Sales Act, sec. 7.
[9] Dexter v. Norton, 47 N. Y., 62.

there is a contract to sell, the same principles apply in case of a destruction or a partial destruction or deterioration of the goods. When it is not possible for the parties to perform the contract which they entered into, as entered into, they are excused. If goods contracted to be sold are totally or partially destroyed before they are transferred to the buyer, there is an unqualified rescission of the contract, and the purchaser may recover as much of the purchase price as has been paid.[10]

### Section 4. Conditions and Warranties.

**§ 31. Condition and warranty distinguished.** These two terms should be carefully distinguished. A condition is a statement or a promise which is of the essence of the contract, a breach of which discharges the contract altogether. In a sale of goods, a tender of the goods agreed upon or of goods of the kind agreed upon, as the case may be, is a condition precedent to any liability of the purchaser for the payment of the price. A warranty, as distinguished from a condition, is a collateral agreement or subsidiary promise, which is not of the essence of the contract, and a breach of which only gives rise to an action for damages, or other appropriate remedy.

"Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only, shall be construed as a warranty."[1]

§ 32. **Broken condition may be treated as warranty.** A condition may be broken and yet the injured party so far acquiesce as to lose his right to a discharge and have only his action for damages, as for a breach of warranty. In Wolcott v. Mount[2] there was a sale of strap-leaf red-top turnip seed to one who was accustomed to raise turnips for the early New York market and

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[10] Kelly v. Bliss, 54 Wis., 187; Curtis V. Hanney, 3 Esp., 82

[1] Sales Act, sec. 12.

[2] 7 Vroom (N. J.), 262.

make large profits, as the seller knew. The seed proved of another kind and the crop was practically worthless. The seed could not be distinguished except by means of the crop that came up. It was held that as rescission was here impracticable the broken condition as to the subject-matter of the sale virtually became a warranty on which suit could be brought for damages.

§ 33. **Scope of warranties.** There can be no warranty where the statement can be only a matter of opinion, as for example, the value of a work of art.

§ 34. **Warranties against visible defects.** There can be no warranty where the defects are actually known and understood by the purchaser at the time of the bargain. A warranty will not extend to guard against defects that are plain and obvious to the senses of the purchaser, and which require no skill to detect, unless the vendor uses art to conceal, and does conceal, such defects.[3] There are often cases where the defect is visible, but its extent can not be ascertained. In Margeston v. Wright [4] a horse sold was warranted sound at the time of the sale. He afterwards became lame from a splint, visible at the time of the sale. The seller was held liable on a warranty. As some splints cause lameness and others do not, the parties must have meant that this was not a splint which would be the cause of future lameness, but they might have saved themselves much trouble by agreeing specifically on this point at the outset.

§ 35. **Sale upon a contingency.** In a sale of goods "to arrive," the arrival of the goods is a condition precedent to the completion of the sale, in the case of a contract to sell, and a condition subsequent, which divests the property in the goods, in the case of a completed sale. The words "to arrive" do not of themselves import a promise that the goods shall arrive. No title passes until the goods have actually arrived. The seller may, of course, warrant the arrival of the goods.

§ 36. **Construction of various contingencies.** Where a time is fixed for the delivery of the goods, the question whether time

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[3] Kenner v. Harding, 85 Ill., 264, 268.

[4] 8 Bing., 454.

is of the essence of the contract is a question of construction in which the intention of the parties is to govern and is proved by the language used, as construed in the light of the circumstances of the case.

Where goods are sold on condition that they shall be satisfactory to the buyer, a common condition in sales of machinery, it is generally held that such contracts are to be construed as meaning that the goods should be satisfactory to a reasonable man.[5] Where such a contract is to be interpreted literally, the purchaser is the sole judge and may reject the goods without assigning any reason for dissatisfaction.[6] This is especially true in cases of the sale of works of art, where the satisfaction of the buyer is to depend upon personal taste, or whim.

**§ 37. Implied warranties of title.** "In a contract to sell or a sale, unless a contrary intention appears, there is: 1. An implied warranty on the part of the seller that in the case of a sale he has a right to sell the goods and that in the case of a contract to sell he will have a right to sell the goods at the time when the property is to pass. 2. An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale. 3. An implied warranty that the goods shall be free at the time of the sale from any charge or encumbrance in favor of any third person, not declared or known to the buyer before or at the time when the contract or sale is made. 4. This section shall not, however, be held to render liable a sheriff, auctioneer, mortgagee, or other person professing to sell by virtue of authority in fact or law goods in which a third person has a legal or equitable interest."[7]

The sale of a chattel is the strongest act of dominion that is incidental to ownership. A purchaser under ordinary circumstances would naturally be led to the conclusion, that, by offering an article for sale, the seller affirms that he has title to sell, and that the buyer may enjoy that for which he parts with his money. In this country it has sometimes been said that a dif-

[5] Hawkins v. Graham, 149 Mass., 284.

[6] Campbell Printing Press Company v. Thorp, 36 Fed. Rep., 414.

[7] Sales Act, sec. 13.

ferent rule prevails when the property is in the possession of a third person. When the vendor is in possession, the rule is universal that there is an implied warranty of title. The exception, where the possession is in a third person, has been much discredited in later decisions. "There seems no reason why, in every case where the vendor purports to sell an absolute and perfect title, he should not be held to warrant." [8]

In any actual transaction, the safest course is for the buyer to satisfy himself as to the seller's title, before paying his money.

**§ 38. Same: Various details.** The seller may, of course, sell merely his right, title and interest in the goods, without a warranty.

Where the seller is a judicial officer, mortgagee, or other person professing to sell, by virtue of authority, the goods of a third person, such person is taken to warrant only his authority to act for the principal, but not the principal's title to the goods.[9] A pawnbroker selling unredeemed pledged goods is not liable upon an implied warranty of title. It is not like the case where articles are bought in a shop professedly carried on for the sale of goods, in which case the vendor sells "as his own."

Where goods are sold by sample and description, it is not enough that the goods correspond with the sample if they do not also correspond with the description.

**§ 39. Implied warranties of quality.** In regard to the quality of goods sold, the maxim of caveat emptor (let the buyer beware) is the general rule. A purchaser must use his own judgment, or else take care to have an express warranty made a part of his contract of purchase. But there are qualifications of this general rule. Where goods are bought for a particular purpose, known to the seller and in reliance upon the judgment of the seller, there is an implied warranty that the goods shall be reasonably fit for such purpose. Where they are bought by description there is an implied warranty that they shall correspond with the description; and where the seller deals in goods of that description, there is also an implied warranty that the

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[8] 1 Smith's Leading Cases, Am. ed. (Edson's), 344.

[9] See Mechem on Agency, secs. 541 ff.

goods shall be merchantable. Where they are sold by sample, there is an implied warranty that they shall correspond with the sample. The buyer must have an opportunity for inspection. There are, then, at the present time, implied warranties that, where the goods are bought for a particular purpose, known to the seller, they shall be reasonably fit for such purpose; that they shall correspond with the description and with the sample, if any; and that, where the seller deals in goods of that description, they shall be merchantable.

§ 40. **Same: Goods bought for particular purpose.** In cases where a manufacturer knows the particular purpose for which his goods are required and the buyer relies on the manufacturer's skill or judgment, the implied warranty is well established, as for example, where a carriage manufacturer made and fitted a pole for a carriage and owing to a latent defect, the pole broke and the horses were injured, the manufacturer being guilty of no negligence, it was held that on a sale of an article for a specific purpose there is a warranty that it is reasonably fit for the purpose, and there is no exception in the case of a latent or an undiscovered defect. The buyer recovered the price of the pole and also for the injury to his horses, that injury being considered a natural consequence of the defect in the pole. "If a man sells generally, he undertakes that the article sold is fit for some purpose; if he sells it for a particular purpose, he undertakes that it shall be fit for that particular purpose."

§ 41. **Same: Seller not a producer of article sold.** In a majority of the courts in this country the same principle does not apply when the seller is merely a dealer and not a manufacturer, but under the Sales Act (§ 39, above) the principle is made to apply to anyone, whether a manufacturer or not, if it appears that the buyer relies on the seller's skill or judgment. This seems the better doctrine.

§ 42. **Same: Sales of food.** In the sale of articles of food by a manufacturer or common dealer, there is an implied warranty that they are fit for food, but there is no such implied warranty in case the seller is not a manufacturer or dealer.

§ 43. **Same: Examination by buyer. Trade usage.** Where the buyer has examined the goods, or has had the opportunity to

examine them, there is no basis for an implied warranty unless the defects be latent, i. e., defects which cannot be discovered by inspection. That an implied warranty may be annexed by the usage of trade is merely in accord with the general rule of law, that the parties to any contract are bound by the usages of trade. They are not bound by any usage which is inconsistent with the general rules of law or with the terms of the contract they have made.

**§ 44. Sale by sample.** There is a sale by sample only when it is understood by the parties, as one of the terms of the contract, that it is to be a sale by sample.

### Section 5. Transfer of Title: As Between Seller and Buyer.

**§ 45. No property passes until goods are ascertained.** "Where there is a contract to sell unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained, but property in an undivided share of ascertained goods may be transferred as provided in section 6." [1]

Section 6, here referred to, contains the provision in regard to the sale of undivided shares (§ 28, above). It was there shown that the property may be transferred in an undivided share of ascertained goods, although there be no separation of the quantity sold, if such be shown to be the intention of the parties. In Aldridge v. Johnson [2] there was a sale of 100 out of a 200 to 300 quarter lot of barley, which was in a large heap, it being agreed that the buyer should send sacks which the seller should fill. The buyer sent 200 sacks, enough to contain the 100 quarters purchased. After the seller had filled 155 sacks for what he considered sufficient cause he changed his mind and emptied the sacks back onto the bulk. It was held that the property in what was put into the sacks had passed to the buyer. Where there is a sale of a particular chattel, the property passes by the sale; but if the thing sold is not ascertained, it does not pass until it is ascertained. Here the right of ascertainment rested with the vendor only. When he had done

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[1] Sales Act, sec. 17.

[2] 7 E. & B., 885.

the outward act which showed which part was to be the vendee's property, his election was made and the property passed.

**§ 46. Property in specific goods passes when parties so intend.** "1. When there is a contract to sell specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. 2. For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade, and the circumstances of the case."[3]

In every contract, the intention of the parties governs as to all its terms. In a sale of goods, if the parties have made it sufficiently clear when they intend the property shall pass, that intention governs. The intention of the parties is proven, as a question of fact, from the contract itself and the circumstances surrounding the sale.[4]

**§ 47. Rules for ascertaining intention: Sales Act.** "Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

"Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

"Rule 2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing be done.

"Rule 3. (1) Where goods are delivered to the buyer 'on sale or return,' or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by return-

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[3] Sales Act, sec. 18.

[4] Lingham v. Eggleston, 27 Mich., 324.

ing or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time.

"(2) When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer: (a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction. (b) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

"Rule 4. (1) Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

"(2) Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee, whether named by the buyer or not, for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section twenty (§ 53, below). This presumption is applicable, although by the terms of the contract the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words 'collect on delivery' or their equivalents.

"Rule 5. If a contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or have reached the place agreed upon."[5]

**§ 48. Same: Where acts are to be done by buyer.** If that

[5] Sales Act, sec. 19.

which remains to be done is to be done by the buyer, instead of by the seller, the presumption is that the parties intend that the property shall pass at once.

This is especially true where the goods have been delivered to the buyer, but something remains to be done in order to ascertain the total value of the goods.[6] "The most important fact indicative of an intent that title shall pass is generally that of delivery. If the goods be completely delivered to the purchaser, it is usually very strong if not conclusive evidence of the intent that the property shall vest in him and be at his risk, notwithstanding weighing, measuring, inspection, or some other act is to be done afterwards."[7] If, however, the delivery is for some special purpose, such as for the purpose of inspecting or testing, that fact may be shown in order to rebut any presumption of intent that the property shall vest from the fact of delivery.

**§ 49. Same: Delivery of goods "on sale or return" and "on approval."** The question, which is involved in the cases mentioned in Rule 3, where the goods are delivered "on sale or return," or "on approval or on trial or on satisfaction," is a question of fact, depending upon the intention of the parties. Where the goods are delivered "on sale or return" the property in the goods passes to the buyer, with the option in the buyer of returning the goods and thus rescinding the sale. This is clearly a sale with a condition subsequent (§ 5, above).

Where the goods are delivered "on approval," or "on trial," or "on satisfaction," the words meaning practically the same thing, there is, in such case, as a general thing, no present sale. The approval or satisfaction of the buyer is a condition precedent to the vesting of the property as upon a completed sale. In all these cases, however, the intention of the parties governs. That intention must be shown from the terms of the contract and the surrounding circumstances. The language used by them is not conclusive, but must be considered in the light of the surrounding circumstances at the time the contract is made.

Any exercise of dominion over the goods by the buyer which

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[6] Hatch v. Oil Company, 100 U. S., 124.

[7] Cooley, J., in Lingham v. Eggleston, 27 Mich., 324.

is inconsistent with the right to return them to the seller will put an end to such right, as by selling the goods or using them in a way which prevents returning them in the same state in which they were delivered to him. If the property has passed to the buyer, though he has the right to rescind the sale and return the goods, all the incidents of ownership attach to them. They are at his risk of loss or damage, they are subject to seizure by his creditors, they are taxable as his goods, and all rights of the seller over them are gone, unless by some special agreement, in which case the rights of the seller arise from and are dependent upon the special agreement alone.

**§ 50. Same: Contract to sell unascertained goods. Assent to appropriation to the contract.** In Rule 4, we are dealing with the case of a "contract to sell," where the property in the goods is to pass at some time subsequent to the agreement. Obviously, the property in the goods cannot pass until particular goods are appropriated to the contract. But appropriation alone is not sufficient. There must be an assent to the appropriation on the part of both the buyer and the seller. In Moody v. Brown [8] there was a contract for stereotype plates, which the seller carried to the store of the buyer, who refused to take them. The seller left them there against the remonstrance of the buyer. It was held that the property in the plates did not pass to the buyer. The buyer might be liable in an action for damages, as for a breach of contract, but, until the buyer accepted the goods, property therein could not vest in him. That is true even where goods are sold by sample and goods conforming to the sample are appropriated to the contract. There must be an assent to the appropriation of the goods. Here again there might be a cause of action based upon the contract itself for not accepting the goods.[9]

The assent may be implied from the words or conduct of the buyer, as where goods were appropriated to the contract and the buyer upon being notified merely said that "he would take them away as soon as he could," [10] or where the buyer promised

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[8] 34 Maine, 107.

[9] Atkinson v. Bell, 8 B. & C., 277.

[10] Rohde v. Thwaites, 6 B. & C., 388

to pay a certain price for the goods,[11] or where the purchaser requested the vendor "to take care of it, until he sent for it."[12] The assent may be given before the appropriation is made. In Langton v. Higgins[13] there was a purchase of a year's crop of peppermint oil. The buyer sent his bottles to be filled. The property passed when the bottles were filled, the assent in that case being before the appropriation was made. "When a vendee sends his ship, or cart, or cask, or bottle to the vendor, and he puts the article sold into it, that is a delivery to the vendee." The assent is obviously given before the appropriation is made.

**§ 51. Same: Delivery of appropriated goods to buyer or bailee.** When the goods are delivered to the buyer, there is a presumption that the seller unconditionally appropriates the goods to the contract, except where the seller reserves the right of property in the goods until certain conditions have been fulfilled. A delivery to a carrier or other bailee is a delivery to the purchaser. Where the goods are sent "C. O. D." the carrier is not to deliver the goods until the buyer pays the price. This is no exception, however, to the rule that the property in the goods passes to the purchaser upon delivery to the carrier.[14] The carrier is the agent of the seller for the collection of the purchase money, a vendor's lien being retained until the purchase price is paid, but the title passes to the buyer.

Of course, as between the parties, the seller may reserve the title until the price is paid, even after delivery to the buyer.

**§ 52. Same: Delivery to be made by seller.** If the seller undertakes to deliver the goods at a particular place (Rule 5), the property in the goods does not pass until they reach that place.

**§ 53. Reservation of right of possession or property when goods are shipped: Sales Act.** "1. Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or prop-

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[11] Goddard v. Binney, 115 Mass., 450.

[12] Wilkins v. Bromhead, 2 M. & G., 963.

[13] 4 H. & N., 402.

[14] Commonwealth v. Fleming, 130 Pa. St., 138; *contra*, State v. O'Neil, 58 Vt., 140.

erty in the goods until certain conditions have been fulfilled. The right of possession or property may thus be reserved notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee for the purpose of transmission to the buyer. 2. Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract. 3. Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the buyer or of his agent, but possession of the bill of lading is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods, as against the buyer. 4. Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading together to the buyer to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange, and if he wrongfully retains the bill of lading he acquires no added right thereby. If, however, the bill of lading provides that the goods are deliverable to the buyer or to the order of the buyer, or is endorsed in blank, or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill of lading or goods from the buyer will obtain the property in the goods, although the bill of exchange has not been honored; provided, that such purchaser has received delivery of the bill of lading endorsed by the consignee named therein, or of the goods, without notice of the facts making the transfer wrongful."[15]

§ 54. **Same: Conditional sales.** It is a common practice to sell goods, especially such as furniture, machinery, and sets of books, upon the terms that payments shall be made upon the purchase price at stated times, and upon condition that the property in the goods shall be retained by the seller until the last

[15] Sales Act, sec. 20.

payment is made. Sometimes the contract is made in the form of a lease, the payments to be made as "rent" until the last payment is made, upon which the property shall pass to the purchaser. The courts are not agreed upon the construction to be put upon such contracts. The payments cannot be rent and also payments upon the price of the goods at the same time. The transaction is intended as a sale and the purchaser is bound by his contract to make all the payments. Upon the purchaser making default in the payments the seller may retake the property, thus disaffirming the sale, or he may bring suit for the purchase price, thereby affirming the sale, but he cannot do both.[16] If the seller reclaims the property, upon a default in payment by the buyer, he is not entitled to any further payments. It seems that the real nature of such transactions is a sale with reservation of title in the seller, as security for the purchase money, in which case it is necessary in most states by statute that the agreement be acknowledged and recorded as a chattel mortgage; otherwise the purchaser having possession can pass the property in the goods to a purchaser for value who has no notice of the secret lien upon the goods.

§ 55. **Same: Nature of bill of lading.** A bill of lading, sometimes spoken of as a "document of title," or a "symbol of property," is a receipt issued by a carrier for goods delivered to him to be carried and delivered to the person named as the consignee or his assigns. They were first issued by masters of vessels, but they are now issued by railroads, and the same principles apply. The master of the vessel ordinarily issues three bills of lading. One is retained by the master himself, another by the consignor, and the other is sent to the consignee. As a general rule, where goods are ordered to be shipped by a carrier, although they are to be selected by the vendor, the property in the goods passes to the purchaser upon such delivery to the carrier. But, where bills of lading are issued by the carrier, the carrier, upon delivery of the goods to him, becomes a bailee of the goods for the person to whom they are deliverable, under the bills of lading, which is the documentary evidence of the

[16] Bailey v. Hervey, 135 Mass., 172.

property in the goods. On receipt of it, the consignee acquires a property in the goods, which can only be defeated by the exercise of the unpaid seller's right of stoppage in transitu, the right of retaking the goods in case of the insolvency of the purchaser.

§ 56. **Same: Bill of lading making goods deliverable to seller.** The consignor may take bills of lading in which he is named the consignee, in which case he retains control over the goods until he assigns the bill of lading over. This is true even though the goods are shipped upon a vessel which belongs to the purchaser. Having the complete control over the goods, the consignor may transfer them to a third person, although in so doing he may make himself liable to the purchaser for a breach of contract.[17]

If the goods are delivered upon the vessel as the goods of the purchaser, the property in the goods passes to the purchaser by such delivery, and the property having vested, the subsequent issue of the bills of lading is inoperative.[18] If the shipper has done anything to divest himself of the property in the goods, he cannot regain that property in himself by having bills of lading subsequently issued to his own order.

Where the bill of lading is taken to the order of the vendor and the vendor keeps it in his own or in his agent's hands, this preserves in him a hold over the goods until the bill of lading is handed over on the conditions being fulfilled, or at least until the consignee offers to fulfil the conditions and demands that the bill of lading be handed over. Such a hold on the goods, retained under the bill of lading, is not merely a right to retain possession until those conditions are fulfilled, but involves in it a power to dispose of the goods on the vendee's default, so long at least as the vendee continues in default.[19] If the bill of lading is taken deliverable to the order of the shipper, the intention being that the shipper shall retain complete control over the goods, he may prevent the purchaser from ever acquiring any property in the goods. If, however, the vendor retains

[17] Wait v. Baker, 2 Ex., —.
[18] Ogle v. Atkinson, 5 Taunton, 759.
[19] Ogg v. Shuter, 1 C. P. D., 47.

the bill of lading merely in order to secure the payment of the purchase money, as when the bill of lading is forwarded with a bill of exchange attached, with directions that the bill of lading be delivered up to the purchaser upon acceptance or payment of the bill of exchange, until the acceptance or payment of the bill of exchange, the property in the goods remains in the vendor, but upon payment or tender of the contract price by the purchaser, the property in the good vests in him. The seller here retains possession of the goods as security for the payment of the price only. The property in the goods, aside from being retained for the purpose of security, is vested in the buyer.[20] This is the meaning of the latter part of clause 2 in the section of the Sales Act quoted in § 53, above.

**§ 57. Same: Seller's retention of bill of lading to order of buyer.** Where the goods are shipped and by the bill of lading are deliverable to "the order of" the buyer, it cannot be known to the carrier who is entitled to receive the goods until the bill of lading is presented. The word "order" here means the same as it does in a negotiable note. If, however, the word "order" is not used, but the goods are "billed straight," it is customary for railroads to deliver up the goods to the consignee, without requiring the surrender of the bill of lading. The carrier, in such case, fulfills the contract under which the shipment is made, if the goods are delivered according to its terms. An unconditional delivery of the goods to the carrier, consigned to the buyer, even though a bill of lading be taken, if there is nothing to control the effect of it, will vest the property in the buyer.[21]

But by taking the bill of lading to the "order of" the buyer, the seller may retain the right to the possession of the goods as long as he retains possession of the bill of lading (clause 4 of section 20 of Sales Act, quoted in § 53, above). If the buyer gets possession of the bill of lading without the consent of the seller, who is thus retaining a lien upon the goods, he is not entitled to possession of the goods, and even an innocent purchaser for value without notice gets no better right.[22]

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[20] Mirabita v. Imperial Ottoman Bank, 3 Ex. Div., 164.

[21] Wigton v. Bowley, 130 Mass., 252.

[22] Shaw v. Railroad Co., 101 Mass., 557

**§ 58. Same: Bill of lading with draft on buyer attached.** The bill of lading is often sent forward with a bill of exchange drawn upon the buyer attached thereto. The goods may be sent to an agent of the seller, with instructions to deliver the bill of lading to the buyer upon his acceptance or payment of the bill of exchange; or the bill of exchange, with the bill of lading attached, may be discounted by the seller's own bank, or deposited therein for collection, in which case the bank forwards them to its correspondent bank at the place of consignment of the goods or residence of the buyer, for the same purpose and with like instructions; or the bill of exchange with the bill of lading attached may be sent directly to the buyer.

In the first two cases, the transfer of the bill of lading to the buyer and the vesting of the property in him are conditional upon his acceptance of the bill of exchange. "When the consignor sends the bill of lading to an agent . . . to be by him handed over to the consignee, and accompanies that with bills of exchange to be accepted by the consignee, that . . . indicates an intention that the handing over of the bill of lading and the acceptance of the bill or bills of exchange, should be concurrent parts of one and the same transaction."[23]

In the third case, where the documents are transmitted directly to the buyer, he may, by means of the bill of lading, get possession of the goods without accepting the bill of exchange, and may transfer the property therein to a purchaser without notice of the circumstances under which the goods have been obtained. As between the seller and the buyer, the transfer of the property, the possession of which the buyer may obtain by means of the bill of lading, is conditional upon the acceptance of the bill of exchange. The principle is expressed in clause 4 of the section of the Sales Act quoted in § 53, above.

**§ 59. Sale by auction.** "In the case of a sale by auction: 1. Where goods are put up for sale by auction in lots, each lot is the subject of a separate contract of sale. 2. A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announce

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[23] Cockburn, C. J., in Shepherd v. Harrison, L. R. 4 Q. B. 493.

ment is made any bidder may retract his bid and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve. 3. A right to bid may be reserved expressly by or on behalf of the seller. 4. Where notice has not been given that a sale by auction is subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ or induce any person to bid at such sale on his behalf, or for the auctioneer to employ or induce any person to bid at such sale on behalf of the seller or knowingly to take any bid from the seller or any person employed by him. Any sale contravening this rule may be treated as fraudulent by the buyer."[24]

These are well established principles.

§ 60. **Risk of loss.** "Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not, except that: (a) Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery; (b) where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault."[25]

As a general rule, the loss follows the title. When it can be shown that the property has passed, the risk of loss is prima facie upon the person in whom the property is vested. On the other hand, when the risk of loss can be shown to be on either party, it is evidence that the property in the goods is in him. But here, as is the general rule, the intention of the parties is what governs. The parties may agree that though the property is in one the risk of loss shall be on the other; as in Martin v.

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[24] Sales Act, sec. 21.
[25] Sales Act, sec. 22.

Kitching,[26] where it was expressly stipulated that the goods should be "at seller's risk two months."

In a conditional contract, such as where the goods are delivered to the buyer on the agreement that the property shall not pass until the price is fully paid, the risk is upon the buyer from the time of the delivery.

### Section 6. Same: As Against Third Parties.

**§ 61. Sale by a person not the owner.** As a general rule a purchaser of property takes only such title as his seller has or is authorized to transfer, and can acquire no other or greater interest. The owner of goods may recover them from one who has purchased them from a thief or a finder or anyone entrusted with possession as a mere bailee.

**§ 62. Same: Owner estopped by conduct.** The owner may, however, by his conduct, preclude himself from denying the seller's authority to sell. If A stands idly by and sees B sell his (A's) goods to C, and C part with the purchase money, A by his conduct precludes himself from later asserting his ownership.[27] In Spooner v. Cummings [28] the owner sold a horse to one Pope with the understanding that title was not to pass until the price was paid. Pope sold the horse to a third person. It was shown that for some time the owner, who was a horse dealer, and Pope had engaged in similar transactions, Pope purchasing the horses upon similar conditional agreements. Pope before paying for them, would resell the horses and send the money to the owner, which he would apply as he saw fit on any of the agreements. It was held that from the course of dealing Pope had implied authority to sell the horse in question and the owner was estopped from denying the validity of the sale.

The mere transfer of possession alone will not work such an estoppel.

**§ 63. Same: Sales by factors.** A factor is a person to whom goods are consigned for sale. He has possession of the goods

[26] L. R. 7 Q. B., 436.

[27] Lord Denman in Pickard v. Sears, 6 A. & E., 469.

[28] 151 Mass., 313.

and may sell them in his own name. He may sell the goods on credit. He has a lien on the goods for advances made by him upon the goods and for the balance of the general account between him and his principal. The principal cannot restrict the authority of the factor as to anyone who has no notice of the restrictions. At common law the factor could not pledge the goods for advances to himself.[29] "Factors' acts" have been passed in England and in some states in the Union, viz., Maine, Massachusetts, Rhode Island, New York, Pennsylvania, Maryland, Ohio, and Wisconsin. By these statutes the authority of the factor is considerably extended. He may, for example, pledge the goods for advances, and persons who advance money in good faith on the security of the goods or documents of title, in reliance upon the possession of the goods or documents of title as proof of authority, are protected, if the goods or documents of title were voluntarily entrusted to the factor by the owner for the purposes specified in the statutes. There are simple statutes on the subject in a few other states. See Agency, Chapter II, § 92.

**§ 64. Sale by one having a voidable title.** "Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided, that he buys them in good faith, for value, and without notice of the seller's defect of title."[30]

Where a sale of goods is obtained by fraud on the part of the purchaser, the transaction is not void but voidable and title vests in the purchaser until the defrauded vendor rescinds the transaction and reclaims the goods. If, however, before rescission, the goods have been sold to a purchaser without notice of the fraud, he obtains an indefeasible property in the goods. The same is true where the sale is made by an owner to defraud his creditors.

**§ 65. Sale by seller in possession of goods already sold.** As between the seller and the buyer, a delivery of the goods is not essential for the completion of a sale. In an executed sale, the buyer becomes vested with the property in the goods, although

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[29] Paterson v. Tash, 2 Strange, 1178.

[30] Sales Act, sec. 24.

the possession is still retained by the seller. The continued possession of the seller, however, is an easy and frequent means of fraud upon later purchasers and upon creditors of the seller. In the case of Lanfear v. Sumner [31] the doctrine was regarded as established that the delivery of possession is necessary in a conveyance of personal chattels, as against everyone but the vendor, and, when the same goods are sold to two different persons by conveyances equally valid, he who first lawfully acquires the possession of the goods will hold them against the other. The vendee must not only take possession, but it must be exclusive of the vendor. Concurrent possession will not be sufficient, but there must be a delivery, either actual or constructive, according to the circumstances of the case. If the property is incapable of manual delivery, such as the furniture in a large hotel, heavy articles, or crops in the field, a change of actual possession is not necessary, but some act must be done by the buyer which indicates that there has been a transfer of property in the goods, some evidence to show that the purchaser asserts his ownership over the goods or acts in a way inconsistent with the property rights of the vendor.[32]

In many states there is no absolute rule of law that the seller must give possession to the buyer in order to pass a title good against later innocent purchasers from the seller, but the continued possession of the seller must be explained so as to negative fraud, just as in the case of attaching creditors of the seller. See § 66, following.

**§ 66. Creditor's rights against sold goods in seller's possession.** Where a sale is made and possession of the goods or of negotiable documents of title to the goods is fraudulently retained, i. e., where the fraud is established, the sale may be avoided by the creditors of the seller. What is necessary to constitute fraud is not a question in the law of sales, and is a question upon which decisions differ in the different states. The continued possession of the seller has been treated by different courts as either conclusive evidence of fraud; or as establishing

[31] 17 Mass., 110.

[32] McKibbon v. Martin, 64 Pa. St., 352; Morton v. Ragan, 68 Ky., 334; Kellogg Newspaper Co. v. Peterson, 62 Ill., 158.

a presumption which may be defeated by other evidence; or as merely evidence, not sufficient to establish a presumption but for the jury to consider under all the circumstances of the case, in determining whether or not the retention of possession by the seller has been fraudulent.

**§ 67. Sale by buyer in possession under conditional sale. Creditors' rights.** As between buyer and seller, as has been said (§ 51, above), the seller may preserve the right of possession or property until the price is paid or secured, in which case the payment or securing of the price is a condition precedent to the passing of the property, even though there has been a delivery to the buyer. The same is generally held, in the absence of statute, as against innocent purchasers from the conditional buyer in possession. Giving the buyer possession under a conditional sale is not such conduct as to estop the seller against purchasers, nor of course against the buyer's creditors.

In a few states the rule is otherwise, without a statute, and in over two-thirds of the remaining states there is a statutory requirement that conditional sales be recorded to give them validity against innocent purchasers, and, in many cases, the buyer's creditors.

**§ 68. Documents of title: At common law.** A bill of lading is not negotiable, as the term is used in regard to bills of exchange and promissory notes. If the consignee assigns a bill of lading to a holder for value, the assignment transfers the right to the specific goods, and this to a certain extent wider than that possessed by the assignor; e. g., the assignee has a right to the goods, which overrides the seller's right of stoppage in transitu, and he can claim the goods in spite of the insolvency of the consignee; but the assignment transfers a right to specific goods, a right in rem, while the negotiation of a negotiable instrument transfers a right in personam against the persons liable. The assignee of a bill of lading acquires no rights independent of those of the assignor. A purchaser for value without notice of a stolen bill of lading does not acquire title to the goods against the true owner, and, wherever a bill of lading is transferred without the authority of the person really entitled, even a bona fide indorsee acquires no rights. The assignment of a bill of lading

can give the assignee no better title than is possessed by the assignor, except that he may take the goods freed from the seller's right of stoppage in transitu.

**§ 69. Negotiable documents of title under Sales Act.** Mercantile custom tends to give a certain negotiable character to documents of title issued by bailees like carriers or warehousemen, by which they promise to deliver goods "to bearer" or "to the order" of persons named. This custom has in the main received little encouragement from the courts, and even statutes enacted to give effect to such customs have frequently been so narrowly construed as to nullify their intentions.[33] The Sales Act (sections 27 to 40) codifies such legislative efforts of this character as have been already made, and extends them so as to enact into a harmonious whole the substance of mercantile understanding and usage respecting such documents. The gist of these provisions is that documents making goods deliverable "to bearer" or "to order" are made negotiable and may be transferred by delivery or by indorsement, according to their tenor, like negotiable instruments for the payment of money, except, that they may be thus negotiated only by their real owner, or by some person entrusted with their possession by the owner. A thief or finder thus can pass no title to such documents.

### Section 7. Performance of the Contract.

**§ 70. Place, time, and manner of delivery.** "1. Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, or usage of trade to the contrary, the place of delivery is the seller's place of business, if he have one, and if not, his residence; but in case of a contract to sell or a sale of specific goods which to the knowledge of the parties when the contract or the sale was made were in some other place, then that place is the place of delivery. 2. Where by a contract to sell or a sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed,

[33] Shaw v. Railroad Co., 101 U. S., 557.

the seller is bound to send them within a reasonable time. 3. Where the goods at the time of sale are in the possession of a third person, the seller has not fulfilled his obligation to deliver to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on the buyer's behalf; but as against all others than the seller the buyer shall be regarded as having received delivery from the time when such third person first has notice of the sale. Nothing in this section, however, shall effect the operation of the issue or transfer of any document of title to goods. 4. Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact. 5. Unless otherwise agreed, the expenses of and incident to putting the goods into a deliverable state must be borne by the seller."[1]

**§ 71. Delivery of wrong quantity.** It is the duty of the seller to deliver the exact quantity sold. The condition is broken by the delivery of a larger quantity as well as by a delivery of a quantity less than that sold. "The delivery of fifteen hogsheads, under a contract to deliver ten, is no performance of that contract, for the person to whom they are sent cannot tell which are the ten that are to be his; and it is no answer to the objection to say that he may choose which ten he likes, for that would be to force a new contract upon him. . . . The delivery of more than ten is a proposal for a new contract."[2] The buyer may accept the amount tendered, in which case he assents to the performance substituted for that required by the terms of the contract. The same principles apply when the seller delivers goods mixed with goods of a different description not included in the contract.

These principles are subject to any usage of trade, special agreement, or course of dealing between the parties. A custom, to bind the parties to a contract, must not be inconsistent with the terms of the contract and must be consistent with the general rules of law. It must be known to both the contracting parties or be so well established in the locality or in the line of

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[1] Sales Act, sec. 43.

[2] Parke, B., in Cunliffe v. Harrison, 6 Ex., 903, 906.

trade that the parties may be taken to have contracted with reference thereto.[3]

**§ 72. Delivery by instalments.** Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

Sometimes an agreement to accept delivery of the goods by instalments is implied from the nature of the goods or other circumstances, as in a purchase of a large amount of hay or coal or lumber; but if such goods are to be delivered at a stated time, there must be a delivery of the last instalment by the stated time. Sometimes one party to a contract claims to be discharged from performance on his part by the fact that the other party has failed to perform, either wholly or to such an extent as to defeat the object for which the contract was made. Where there is a contract to sell goods to be delivered and paid for by instalments, whether a default, either in making delivery or making a payment, discharges the contract, or merely gives rise to an action for damages, is a question of fact depending upon the circumstances of each case. It is the generally accepted doctrine that such contracts are entire; that the provisions as to delivery of the goods by stated instalments, which are to be separately paid for, do not render the contract divisible; and that where the seller fails to deliver one instalment, the buyer has the right to rescind the contract.[4]

Where the payments are to be made by instalments, a default in a payment excuses further performance by the other party.[5] The party not in default may refuse to deliver any more goods and recover for those already delivered. He may not recover for loss of profits on the balance of the contract, which he elects not to perform.[6] If the instalments are numerous and extend over a considerable period of time, a default either of delivery or payment would not appear to discharge the contract, although it would give rise to an action for damages.

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[3] Barnard v. Kellogg, 10 Wallace, 383.

[4] Hoare v. Rennie, 5 H. & N., 19; Norrington v. Wright, 115 U. S., 188 (in which there is a full review of the English and American cases).

[5] Rugg v. Moore, 110 Pa. St., 236

[6] Keeler v. Clifford, 165 Ill., 544.

**§ 73. Delivery to a carrier on behalf of the buyer.** "1. Where, in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, is deemed to be a delivery of the goods to the buyer, unless a contrary intent appears. Unless otherwise agreed, where goods are sent by the seller to the buyer under circumstances in which the seller knows or ought to know that it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such transit."[7]

The carrier is ordinarily the agent of the buyer, for the transmission of the goods to the buyer. If, by the contract, the seller is to deliver the goods at a particular place, as at the buyer's residence or place of business, the carrier is in that case the agent of the seller, and delivery to the carrier is no delivery by the seller. It is the duty of the seller to use due care in packing and shipping the goods.

**§ 74. Right to examine the goods.** There is not a valid tender of goods by a delivery or offer to deliver closed casks said to contain them; but they should be tendered in such a way that the buyer may have a reasonable opportunity of inspecting them, and of ascertaining whether what he has bargained for is presented for his acceptance.[8] Where an article is one which must be used before its quality can be ascertained, it is the right of the purchaser to make use of so much thereof as, under all the circumstances, may become actually necessary for that purpose, without liability for the same if it fails, in the test, to fulfill the contract.[9] Where goods are sent by express and the buyer is, by the terms of the contract, to pay the price to the express company, by whom it is to be remitted to the seller, the buyer is not entitled to inspect the goods before payment of the price.[10]

**§ 75. What constitutes acceptance.** The buyer accepts the

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[7] Sales Act, sec. 46.

[8] Isherwood v. Whitmore, 11 M. & W., 347.

[9] Philadelphia Whiting Co. v. Detroit Lead Works, 58 Mich., 29.

[10] Wiltse v. Barnes, 46 Iowa, 210.

goods when he manifests his assent to the passing of the property to himself or when he acts toward the goods in a manner consistent only with ownership in himself, as by a resale, by consuming them, or by retaining the goods an unreasonable length of time without rejecting them.

**§ 76. Acceptance does not bar action for damages.** "In the absence of an express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor."[11]

The buyer may accept the goods and hold the seller liable for damages on account of failure to deliver the entire quantity contracted for, or for supplying goods of an inferior quality, or for not delivering the goods within the required time.

**§ 77. Buyer is not bound to return goods wrongly delivered.** "Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he notifies the seller that he refuses to accept them."[12]

In such case, the buyer has possession of the goods as a bailee and is under the obligations of a bailee in regard to the care and custody of the goods. He may have the goods stored at reasonable expense, at the expense of the seller, and, in some cases, may sell the goods for the benefit of the seller, as in the case of perishable goods. The buyer must act in good faith and with a view to saving the seller as much loss as possible.

**§ 78. Buyer's liability for failing to accept delivery.** It is not only the duty of the seller to deliver the goods according to the terms of the contract, but it is also the duty of the buyer to accept such delivery at the time called for by the contract or within a reasonable time, and, upon failure, he is liable for his

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[11] Sales Act, sec. 48.

[12] Sales Act, sec. 50

breach of contract, and the damages will be assessed according to the injury inflicted upon the seller—such damages as may fairly and reasonably be considered either arising naturally or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable results of the breach of it.[13] A reasonable charge for warehouse room is within the rule.[14]

If the property in the goods has not passed, the seller is not entitled to compensation for the care and custody of his own goods. His only remedy is upon the breach of contract, and he has but one cause of action.

### Section 8. Rights of Unpaid Seller Against the Goods.

**§ 79. Definition of unpaid seller.** "1. The seller of goods is deemed to be an unpaid seller within the meaning of this act: (a) When the whole of the price has not been paid or tendered; (b) when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has been broken by reason of the dishonor of the instrument, the insolvency of the buyer, or otherwise. 2. In this part of this act the term 'seller' includes an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price, or any other person who is in the position of a seller." [1]

Where the property in the goods has passed to the buyer the remedies of the seller are solely for enforcing the payment of the price. "The sale of a specific chattel on credit, though that credit may be limited to a definite period, transfers the property in the goods to the vendee, giving the vendor a right of action for the price, and a lien upon the goods, if they remain in his possession, till that price be paid. But that default of payment does not rescind the contract. . . . In a sale of chattels, time is not of the essence of the contract, unless it is made so by ex-

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[13] Hadley v. Baxendale, 9 Ex., 353.

[14] Greaves v. Ashlin, 3 Campbell, 426.

[1] Sales Act, sec. 52.

press agreement." The seller's right to detain the thing sold is a right of lien till the price is paid, not a right to rescind the bargain. The seller does not lose his lien by the acceptance of payment of part of the price.[2]

**§ 80. Receipt of negotiable instrument as payment.** Whether or not the receipt of a promissory note or draft or check is payment is a question of the intention of the parties. If intended as payment, there is a substitution of a new liability for the old one, and the buyer is discharged from his previous obligation for the price of the goods. The seller relies upon a new cause of action upon the instrument, and, if it be dishonored, may bring suit for the price of the goods. But the instrument may be accepted conditionally, the seller taking the negotiable instrument instead of immediate payment, but upon condition that if the negotiable instrument be dishonored at maturity, the seller shall be entitled to his original cause of action. As a general rule, the English and American courts hold that the presumption, in the absence of proof to the contrary, is that the instrument is taken conditionally. A few states hold that the presumption is that it is taken absolutely. But, in either case, if there is any evidence of intent the question becomes one of fact for the jury; if there is no evidence the presumption must control.[3]

**§ 81. Remedies of an unpaid seller.** "1. Subject to the provisions of this act, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has: (a) A lien on the goods or right to retain them for the price while he is in possession of them; (b) in case of the insolvency of the buyer, a right of stopping the goods in transit after he has parted with the possession of them; (c) a right of resale as limited by this act; and (d) a right to rescind the sale as limited by this act.

Where the property in the goods has not yet passed to the buyer, and the seller still has possession, the seller has full power to deal with the goods, so far as his disposition of them is concerned, having the possession coupled with the legal title. The

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[2] Hodgson v. Lay, 7 T. R., 436.

[3] Anson, Law of Contract (2d Am. ed.), 350, n. 1.

adjustment of their rights and liabilities is merely a matter of contractual rights and obligations. Where the goods are still in the seller's possession, but the property therein has passed to the buyer, the seller may have one or more of the four remedies given above. They will be considered in order in the following subsections.

§ 82. **Unpaid seller's lien: When right of lien may be exercised.** In the absence of an agreement to the contrary, the seller is entitled to payment upon delivery of the goods to the buyer. He has, then, a lien upon the goods for the price, unless there is an express agreement to extend credit. Where the goods have been sold on credit, but the term of credit has expired, the seller in possession of the goods is still entitled to retain possession until the price is paid or tendered. "When goods have been sold on credit, and the purchaser permits them to remain in the vendor's possession till the credit has expired, the vendor's lien, which was waived by the grant of credit, revives upon the expiration of the term, even though the buyer may not be insolvent."[4]

Where the buyer becomes insolvent, the seller is entitled to retain possession, although the goods were sold on credit. One who contracts to sell goods on credit, thereby agrees to waive his lien for the purchase money; but he does so on the implied condition that the purchaser shall keep his credit good. If, therefore, before payment, and while the seller still retains possession of the goods, he discovers that the purchaser is insolvent, he may hold the goods as security for the price.[5] Although the seller is in possession as agent or bailee for the buyer, yet such possession by the seller is actual possession, in which case he may exercise his right of lien.

§ 83. **Same: Lien after part delivery.** The lien attaches to every part of the goods for the full amount of the price. If a part of the goods has been delivered, the seller has a lien upon the goods which remain in his possession, for the full amount of the price which remains unpaid.

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[4] Benjamin, Sales, s. 1227.

[5] Crummey v. Raudenbush, 55 Minn., 428.

§ 84. Same: When lien is lost. A lien is effectual only while the lien-holder keeps possession. If he voluntarily relinquishes possession, his lien is lost. It may be retained by agreement, and, in that case, the lien is effectual at least between the parties. If the goods are delivered in the case of a sale for cash before the money happens to be paid, the seller may reclaim them if he acts promptly. Where the buyer obtains possession by a trick, the seller does not lose his lien.[6]

§ 85. Stoppage in transitu: Seller may stop goods on buyer's insolvency. "Subject to the provisions of this act, when the buyer of goods is or becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transit; that is to say, he may resume possession of the goods at any time while they are in transit, and he will then become entitled to the same rights in regard to the goods which he would have had if he had never parted with the possession."[7]

The right of stoppage in transitu is merely an extension of the right of lien which the seller has upon the goods for the price. The property vests in the buyer, upon the sale, but, where the price is to be paid upon delivery, the seller has a right to retain the goods till payment is made; and, where the goods are in the possession of a carrier for transportation to the buyer or to the place of delivery, if the buyer becomes insolvent, the seller may repossess himself of the goods, if he can do so while they are still in the hands of the carrier. This does not rescind the contract, but restores the seller's lien. The buyer may have become insolvent after the sale, or he may have been insolvent at the time of the sale, if that fact were unknown to the seller.

As to what constitutes insolvency, the common law rule is expressed in the Sales Act, as follows: "A person is insolvent within the meaning of this act who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he is insolvent within the meaning

[6] Ames v. Moir, 130 Ill. 582.
[7] Sales Act, sec. 57.

of the federal bankruptcy law or not."[8] It is sufficient, for the exercise of the right of stoppage in transitu, if the buyer is either in fact insolvent or if he has afforded the ordinary apparent evidences of insolvency. The seller has the right, although he received the buyer's negotiable securities, and even though they have been negotiated and are still outstanding.[9]

§ 86. **Same: When goods are in transit.** The seller may exercise his right of stoppage in transitu at any time before the final delivery to the buyer or his agent. It must be some agent other than the carrier, who is, to be sure, the agent of the buyer for transporting the goods, and delivery to whom is taken as delivery to the buyer for the purpose of passing the property in the goods. As long as the goods are in the possession of the carrier, though the goods may be at the destination of the journey, this right exists. If, however, the carrier's possession as such has ceased, and he has become an agent or warehouseman for the buyer, the right is ended, the carrier by agreement holding the goods for the buyer, not as carrier, but as agent or on a new bailment.[10]

If the original transit has ended and a new transit has begun, by the direction of the buyer, the right no longer exists. "Where the transit is a transit which has been caused either by the terms of the contract or by the directions of the purchaser to the vendor, the right of stoppage in transitu exists; but, if the goods are not in the hands of the carrier by reason either of the terms of the contract or of the directions of the purchaser to the vendor, but are in transitu afterwards in consequence of fresh directions given by the purchaser for a new transit, then such transit is no part of the original transit, and the right to stop is gone. So, also, if the purchaser gives orders that the goods shall be sent to a particular place, there to be kept till he gives fresh orders as to their destination to a new carrier, the original transit is at end when they have reached that place, and any further transit is a fresh and independent transit."[11] If the buyer

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[8] Sales Act, sec. 76, Clause 3.

[9] Diem v. Koblitz, 49 Ohio St., 41.

[10] Ex parte Cooper, 11 Ch. D., 68; Guilford v. Smith, 30 Vt., 49.

[11] Bethell v. Clark, 20 Q. B. D., 615.

obtains a delivery of the goods at a point before the goods have reached their destination, and before any order to stop is given, the right is ended.[12] The right no longer exists where the goods have been taken from the carrier by a truckman, even though the truckman received the goods in accordance with the general authority of the consignee to receive all goods addressed to him.[13]

**§ 87. Same: Who may stop goods, and subject to what claims.** The right of stoppage in transitu is personal to the seller. It cannot be exercised by his creditors, the property in the goods being in the buyer; but this right of the seller is paramount to any right of creditors of the buyer to attach the goods.[14] It is subject to the lien of the carrier for the transportation of the goods, but paramount to any lien of the carrier, by agreement or custom, for a general balance. If part of the goods have been delivered, the carrier may exercise the right over the remainder, unless by agreement a delivery of part is intended as a delivery of the whole, and the carrier holds the balance of the goods in some other capacity, as the purchaser's agent or bailee.[15]

**§ 88. Same: Effect of transfer of negotiable document of title.** "Subject to the provisions of this act, the unpaid seller's right of lien or stoppage in transit is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto. If, however, a negotiable document of title has been issued for goods, no seller's lien or right of stoppage in transit shall defeat the right of any purchaser for value in good faith to whom such document has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier or other bailee who issued the document, of the seller's claim to a lien or right of stoppage in transit."[16]

The provision of the Sales Act restricting the operation of

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[13] Whitehead v. Anderson, 9 M. & W., 518.
[14] O'Neal v. Day, 53 Mo. App., 139.
[15] Blackman v. Pierce, 23 Cal., 508.
[16] Dickson v. Yates, 5 B. & Ad., 313; Kemp v. Falk, 7 App. Cas., 573.
[16] Sales Act, sec. 62.

this principle to a transfer of a negotiable document of title is contrary to the English law and perhaps that of some American states which recognize no distinction between negotiable and non-negotiable bills of lading.

**§ 89. Same: Ways of exercising the right to stop.** "1. The unpaid seller may exercise his right of stoppage in transit either by obtaining actual possession of the goods, or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may prevent a delivery to the buyer. 2. When notice of stoppage in transit is given by the seller to the carrier or other bailee in possession of the goods, he must redeliver the goods to, or according to the directions of, the seller. The expenses of such redelivery must be borne by the seller. If, however, a negotiable document of title representing the goods has been issued by the carrier or other bailee, he shall not be obliged to deliver, or be justified in delivering, the goods to the seller unless such document is first surrendered for cancellation." [17]

**§ 90. Resale by the seller: Sales Act.** "1. Where the goods are of a perishable nature, or where the seller expressly reserves the right of resale in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time, an unpaid seller having a right of lien or having stopped the goods in transit may resell the goods. He shall not thereafter be liable to the original buyer upon the contract to sell or upon the sale, or for any profit made by such resale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale. 2. Where a resale is made, as authorized by this section, the buyer acquires a good title as against the original buyer. 3. It is not essential to the validity of a resale that notice of an intention to resell the goods be given by the seller to the original buyer. But where

[17] Sales Act, sec. 59.

the right to resell is not based on the perishable nature of the goods or upon an express provision of the contract or of the sale, the giving or failure to give such notice shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the resale was made. 4. It is not essential to the validity of a resale that notice of the time and place thereof should be given by the seller to the original buyer. 5. The seller is bound to exercise reasonable care and judgment in making a resale, and subject to this requirement may make a resale either by public or private sale."[18]

**§ 91. Same: Illustrations and comment.** All goods the value of which is likely to depreciate within a short time, are perishable. "If articles are not perishable, price is, and may alter in a few days or a few hours. In that respect there is no difference between one commodity and another. It is a practice therefore founded on good sense to make a resale of a disputed article, and to hold the original contractor responsible for the difference."[19] A disposal of the goods by the vendor, to prevent further loss on the buyer's refusal to receive them is not a rescission of the contract. "The vendor of personal property, in a suit against the vendee for not taking and paying for the property, has the choice ordinarily of either one of three methods to indemnify himself. 1. He may store or retain the property for the vendee, and sue him for the entire purchase price. 2. He may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such sale. 3. He may keep the property as his own, and recover the difference between the market price at the time and place of delivery, and the contract price."[20] The resale need not be by auction; any fair sale made in good faith according to established business methods, with no attempt to take advantage of the vendee, is all that is required.[21] It is not essential that notice of the sale be given to the vendee, though failure to give notice may be evidence of bad faith on the part

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[18] Sales Act, sec. 60.

[19] Maclean v. Dunn, 4 Bingham, 722.

[20] Earl, C., in Dustan v. McAndrew, 44 N. Y., 72, 78.

[21] Ackerman v. Rubens, 167 N. Y., 405.

of the vendor. The vendor is entitled to deduct the expenses of the resale, but not to put in charges for his own services.[22] If any profit, instead of a loss, is realized upon the resale, the seller is entitled to keep it as his own.[23]

**§ 92. Rescission by the seller.** "1. An unpaid seller, having a right of lien or having stopped the goods in transit, may rescind the transfer of title and resume the property in the goods, where he expressly reserved the right to do so in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time. The seller shall not thereafter be liable to the buyer upon the contract to sell or the sale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or of the sale. 2. The transfer of title shall not be held to have been rescinded by an unpaid seller until he has manifested by notice to the buyer or by some other overt act an intention to rescind. It is not necessary that such overt act should be communicated to the buyer, but the giving or failure to give notice to the buyer of the intention to rescind shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the right of rescission was asserted."[24]

It has been shown above that the seller, by holding the possession of the goods or reclaiming them after the purchaser refuses to pay, does not thereby rescind the sale. He retains possession to enforce his lien as vendor.[25] His election to rescind must be manifested by notice or some overt act, as by a sale of the goods or dealing with them in a manner inconsistent with the former buyer's right of property therein.

### Section 9. Actions for Breach of the Contract.

**§ 93. Action for the price: Sales Act.** "1. Where, under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to

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[22] Penn v. Smith, 93 Ala., 476.
[23] Warren v. Buckminster, 24 N. H., 336.
[24] Sales Act, sec. 61.
[25] Ames v. Moir, 130 Ill., 582.

pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods. 2. Where, under a contract to sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract. But it shall be a defense to such an action that the seller at any time before judgment in such action has manifested an inability to perform the contract or the sale on his part or an intention not to perform it. 3. Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section sixty-four, clause 4 (§ 94, below), are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller shall treat the goods as the buyer's, and may maintain an action for the price."[1]

**§ 94. Action for damages for non-acceptance of the goods.** "1. Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance. 2. The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract. 3. Where there is an available market for the goods in question, the measure of damage is, in the absence of special circumstances showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept. 4. If, while labor or expense of material amount is necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to

[1] Sales Act, sec. 63.

the seller for no greater damages than the seller would have suffered if he did nothing toward carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit which the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages."[2]

§ 95. **Rescission of contract or sale.** "Where the goods have not been delivered to the buyer, and the buyer has repudiated the contract to sell or sale, or has manifested his inability to perform his obligations thereunder, or has committed a material breach thereof, the seller may totally rescind the contract or the sale by giving notice of his election so to do to the buyer."[3]

In such case he has his action on the breach of contract, and, if he has partly performed, he may recover the value of what he has furnished to the other party.[4]

§ 96. **Remedies for breach of warranty: Sales Act.** The remedies provided in the following section of the Sales Act are well established by the courts generally, in this country: "1. Where there is a breach of warranty by the seller, the buyer may, at his election: (a) Accept or keep the goods and set up against the seller the breach of warranty by way of recoupment in diminution or extinction of the price; (b) accept or keep the goods and maintain an action against the seller for damages for the breach of warranty; (c) refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty; or (d) rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid. 2. When the buyer has claimed and has been granted a remedy in any one of these ways, no other remedy shall thereafter be granted. 3. Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the

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[2] Sales Act, sec. 64.

[3] Sales Act, sec. 65.

[4] Cort v. Ambergate Railway Co., 17 Q. B., 127; Derby v. Johnson, 21 Vt., 17.

goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time when the property was transferred to the buyer. But if deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and rescinding the sale. 4. Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price. 5. Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by section fifty-three (§ 81, above). 6. The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty. 7. In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty."[5]

§ 97. **Same: After receipt of goods.** If the buyer, who has received the article, uses it and derives a benefit from it, he cannot thereafter rescind the contract, but is left to his action for damages for the breach of warranty.[6] Where the buyer accepts the goods after a full and fair opportunity of inspection, he is, in the absence of fraud, estopped from thereafter raising objec-

[5] Sales Act, sec. 69.

[6] Lyon v. Bertram, 20 How., 149.

tions as to visible defects and imperfections, whether discovered or not, unless such delivery and acceptance is accompanied by some warranty of quality manifestly intended to survive acceptance.[7] It is the better view that the buyer to whom the property has been delivered may rescind the contract for breach of warranty, by a reasonable return of the property, if it can be returned to the seller in the same state in which it was delivered to the buyer. It may be returned in a defective condition, if the defect is owing to the breach of warranty itself. In Smith v. Hale[8] a buggy was sold with a warranty that the springs were strong. One of the springs broke while the buggy was in the buyer's possession. It was held that the buyer might rescind the contract and return the buggy. "The breaking of the spring was just what the plaintiff had warranted against." A number of states hold that there can be no return of the goods for breach of warranty, in the absence of fraud.[9]

[7] Studer v. Bleistein, 115 N. Y., 316.

[8] 158 Mass., 178.

[9] Thornton v. Wynn, 12 Wheat. 183, 193; Brigg v. Hilton, 99 N. Y., 517, 529.

## CHAPTER VI.

## CHATTEL MORTGAGES.

**§ 1. Chattel mortgage distinguished from sale with right to repurchase.** A chattel mortgage is often hard to distinguish from a sale with the right to repurchase, because they are both in form conditional sales and in courts of law are treated the same. But in equity, if the transaction was to secure a debt, it is a mortgage, so the important fact whether it was so intended has to be determined. Where it is clear there is a debt secured, the transaction is a mortgage, of course; and, if it is merely shown there is a debt between the parties, the presumption is that the transaction is a mortgage, though this presumption may be overcome by clear evidence that a conditional sale was really intended. Inadequacy of price also indicates a mortgage. Whenever the evidence is such that the court is doubtful what was intended it always presumes the transaction is a mortgage.

**§ 2. Chattel mortgage distinguished from pledge.** There are two important distinctions between a chattel mortgage and a pledge. The first of these is that in a chattel mortgage the legal title passes to the mortgagee, while the pledgor retains the title, a pledge being a mere giving of the possession of the property to hold as security. The second distinction is that the pledge from its nature cannot exist, unless possession is given to the pledgee, while the fact that the possession is retained by a mortgagor has no effect whatever on the validity of the mortgage. In fact, chattel mortgagors commonly keep possession of the mortgaged property. When the transaction is oral and possession is delivered over, whether it is a pledge or a mortgage is a question of intention of the parties, the presumption being in favor of a pledge. When there is an instrument in the form

of a mortgage, however, the transaction cannot be shown to be a pledge.

§ 3. **Form of chattel mortgages.** In many states a parol mortgage is not enforceable because a section of the statute of frauds requires all contracts for the sale of goods, wares, and merchandise, when amounting to more than a certain sum in value, to be in writing. Where such a statute is in force a chattel mortgage must be in writing if for a sum within the statute. Another difficulty about a parol mortgage is that it cannot be recorded, and recording is required by statute in most states to protect the mortgagee from subsequent purchasers who have no notice of the mortgage, if possession of the property is retained by the mortgagor. A chattel mortgage usually consists of a bill of sale of the goods, with a condition attached. No particular form of words is required, it being enough if the language is sufficient to pass title to personal property. Many states, in order to prevent clandestine bills of sale, made to defraud creditors of the mortgagor, require that the mortgagor attach his affidavit to the effect that the mortgage was made in good faith, in order to make it valid except as between the parties.

A form of chattel mortgage is as follows:

CHATTEL MORTGAGE.

KNOW ALL MEN BY THESE PRESENTS, That *William Stone*, of the City of *Chicago* in the County of *Cook*, and State of *Illinois* in consideration of the sum of *Six Hundred* Dollars, to *him* paid by *John C. Davis* of the County of *Cook* and State of *Illinois*, the receipt whereof is hereby acknowledged, *does* hereby grant, sell, convey and confirm, unto the said *John C. Davis* and to *his* heirs and assigns, the following Goods and Chattels, to-wit: *One two-door closed sedan automobile, Oldsmobile make, factory number 268930F, engine number F575870, and of six cylinder, 26 horse power, together with all and singular the appurtenances thereunto belonging, or in any wise appertaining.*

TO HAVE AND TO HOLD all and singular the said goods and Chattels, unto the said Mortgagee herein and *his* heirs, executors, administrators and assigns, to *his* and their sole use forever. And the Mortgagor herein, for *himself* and for *his* heirs, executors and administrators, do*es* hereby covenant to and with the said Mortgagee, *his* heirs, executors, administrators and assigns, that said Mortgagor *is* lawfully possessed of the said Goods and Chattels, as of *his* own property; that the same are free from all encumbrances, and that *he* will, and *his* executors and administrators shall, warrant and defend the same to *John C. Davis*, the said Mortgagee, *his* heirs, executors, administrators and assigns, against the lawful claims and demands of all persons, and will keep the said Goods and Chattels insured against loss by fire for the full insurable value thereof, in such companies as the holder of the note hereinafter mentioned, may direct, and make the loss, if any, payable to, and deposit the policies with, the holder of said note as further security for the indebtedness hereinafter mentioned.

PROVIDED, nevertheless, that if the said Mortgagor, *his* executors or administrators, shall well and truly pay unto the said Mortgagee, *his* executors, administrators or assigns, *one year from this date the sum of Six Hundred Dollars ($600.00) with interest at five per cent per annum, payable semi-annually, for which said William Stone has given his promissory note, dated this day and payable one year hence to the order of the said John C. Davis*, then this mortgage is to be void, otherwise to remain in full force and effect.

AND PROVIDED, also, that it shall be lawful for the said Mortgagor, *his* executors, administrators and assigns, to retain possession of the said GOODS AND CHATTELS, and at *his* own expense, to keep and use the same, until *he* or *his* executors, administrators or assigns, shall make default in the payment of the said sum of money above specified, either in principal or interest, at the time or times, and in the manner hereinbefore stated. And the said Mortgagor hereby covenants and agrees that, in case default shall be made in the payment of the notes or either of them, or any part thereof, or the interest thereon on the day or days respectively on which the same shall become due and payable; or if the Mortgagee, *his* executors, administrators or assigns, shall feel *he* is insecure or unsafe, or shall fear diminution, removal, or waste of said property; or if the Mortgagor shall sell or assign, or attempt to sell or assign, the said Goods and Chattels, or any interest therein, or shall fail or neglect to keep the said Goods and Chattels insured and to deposit the policies, as aforesaid; or if any Writ or any Distress Warrant shall be levied on said Goods and Chattels or any part thereof, then, and in any or

either of the aforesaid cases, all of said note and sum of money, both principal and interest, shall, at the election of the said Mortgagee, *his* executors, administrators or assigns, without notice of said election to anyone, become at once due and payable; or without such election by said Mortgagee the said Mortgagee, *his* executors, administrators or assigns, or any of them, shall thereupon have the right to take immediate possession of said property, or any portion thereof, and, for that purpose may pursue the same wherever it may be found, and may enter any of the premises of the Mortgagor, with or without force or process of law, wherever the said Goods or Chattels may be, or supposed to be, whether in this County or State, or elsewhere, and search for the same, and if found, to take possession of, keep and store the same on said premises till sold; or remove, and sell, and dispose of the said property, or any part thereof at public auction, to the highest bidder, after giving five days' notice of the time, place, and terms of sale, together with a description of the property to be sold, by notices posted up in three public places in the vicinity of such sale; or at private sale, with or without notice, for cash or on credit, as the said Mortgagee, *his* heirs, executors, administrators or assigns, agents or attorneys, or any of them, may elect, and, out of the money arising from such sale, to retain all costs and charges for pursuing, searching for, taking, removing, keeping, storing, advertising, and selling such Goods and Chattels, and all prior liens thereon, together with the amount due and unpaid upon said note, rendering the surplus, if any remain, unto said Mortgagor, or *his* legal representatives. It is expressly agreed, that in case of the foreclosure of this Mortgage by proceedings in court, or in case said Mortgagee, his heirs or assigns, shall be a party to any suit by reason of this Mortgage, he or they shall be allowed and paid all reasonable costs, attorney's fees, expenses and charges incurred, not to exceed the sum of *One Hundred ($100.00)* Dollars, and the same shall be and is hereby made a further charge and lien upon said Goods and Chattels.

WITNESS The hand and seal of the said Mortgagor, this *fifth* day of *October* in the year of our Lord one thousand nine hundred *thirty-seven.*

*(Signed) William Stone.* [SEAL]

Signed, Sealed and Delivered
in Presence of
*(Signed) Samuel Adams.*

***Should be acknowledged and recorded according to the laws of the particular state wherein executed.***

**§ 4. Property subject to chattel mortgage: Fixtures.** The general rule is that any personal property, which is subject to present sale, is subject to chattel mortgage; for a chattel mortgage is in form a conditional sale. There arises a great deal of difficulty as to chattel mortgages on fixtures. Fixtures include a vast variety of articles which are more or less firmly attached to land, or to buildings on land, and in law, by such attachment, cease to be chattels and become a part of the real estate. (See Landlord and Tenant, Chapter IX, § 22.) A chattel mortgage may be given before attaching the chattel to the land, but, after attaching, the title cannot be in the chattel mortgagee because he has a chattel mortgage only and the articles covered have changed their character and become real estate. The chattel mortgage does not amount to, nor was it intended as, a mortgage on real estate, and therefore, when the fixture is attached to the land, the title to it is in the land owner. But such a chattel mortgage is good in equity between the parties. Suppose, however, the land to which the mortgaged chattels are attached is mortgaged. Here a conflict arises between the two mortgagees. Where the real estate mortgage was in existence at the time the chattels were attached to the land, the rule is that the chattel mortgagee has a right in equity to a lien to the extent to which the attachment of the chattels or fixtures increases the value of the land, for the real mortgagee did not rely on this additional value when he took his mortgage. There are some courts, however, which hold that when the fixtures are attached they become a part of the realty, subject to the mortgage on the land; and, even though the parties to the chattel mortgage agree that they shall remain chattels, this agreement does not affect the right of the real mortgagee.

**§ 5. Chattel mortgage of future property.** A chattel mortgage, being in form a sale on condition, cannot cover property to be acquired in the future; for, as a general rule, one cannot make a present sale of an article he does not own. (See Chapter V, §§ 24-27.) To illustrate, one cannot give a legal mortgage on a stock of goods in a store where goods are being constantly sold and replaced with new purchases, so as to cover the goods purchased after the mortgage was given. The attempt to make such

a mortgage is sufficient to give a lien in equity on the after-acquired goods, but, this being only an equitable right, is not good against subsequent purchasers for value, without notice of such right.[1]

§ 6. **Description of property.** The property covered by a chattel mortgage should be described so particularly that it can be identified. If this description is indefinite, extrinsic evidence cannot be used to show what property is really covered.

§ 7. **Description of mortgage debt.** The obligation secured by a mortgage may be pre-existing, contemporaneous, or one to arise in the future. The debt must be so definitely described and limited in the mortgage, that it may be recognized and distinguished from other debts.

§ 8. **Execution of chattel mortgage.** The statute of frauds requires written instruments to be signed by the party to be charged, and this statute applies to chattel mortgages. Consequently, the instrument should be signed by the mortgagor.

§ 9. **Formalities required as against innocent purchasers of mortgaged property: Change of possession.** By agreement or permission of the mortgagee, the mortgagor is usually allowed to remain in possession of the mortgaged property. In many states there is in such cases a presumption of fraud, which must be explained in order to protect the mortgagee. In some the presumption of fraud is conclusive. The mortgagee is, of course, protected where he actually takes and continues in the possession of the mortgaged property. In most or all states this question is now obsolete, on account of the existence of recording statutes, described below.

§ 10. **Same: Recording acts.** In order to enable a party to make a valid chattel mortgage and retain possession of the mortgaged property, recording laws are in force in most of the states which provide that, if a chattel mortgage is not recorded or filed according to the requirements of the statute, it shall not be valid as against subsequent purchasers and creditors if the mortgagee does not take possession. Anyone interested, by search-

[1] Holroyd v. Marshall, 10 House of Lords Cases 191.

ing the chattel mortgage records, can find out whether personal property is mortgaged, and, if no mortgage appears on record, can safely proceed to purchase or take a mortgage on such property in the owner's possession. A mortgagee, on the other hand, by recording or filing his mortgage, can protect himself against subsequent bona fide purchasers and creditors, for the chattel mortgage record is constructive notice of his mortgage as to all third parties. If the mortgagor resides in the state, the mortgage must be recorded in the county where he resided when it was executed, or, by some statutes, in the county where the property is located; if he lives outside the state, it must be recorded where the mortgaged property was located when the mortgage was executed. The statute usually provides that when there are several mortgagors, some residents of the state and some non-residents, the mortgage must be recorded in the county or counties where the resident mortgagors reside, and also in the county where the property is located when the mortgage was executed.[2] When a mortgage covers both real and personal property it should be recorded both in the real mortgage records and in the chattel mortgage records.

**§ 11. Same: Delivery after failure to record.** When a chattel mortgage is not recorded, it is generally made valid, under the recording laws, if the property is delivered to the mortgagee before any third parties have acquired adverse rights in it. Delivery of the mortgaged property to the mortgagee not only makes an unrecorded chattel mortgage valid as to third parties, but also covers any indefiniteness in the description of the goods in the instrument, for, after delivery to the mortgagee, there is no doubt as to the goods intended to be covered by the mortgage.[3]

**§ 12. Mortgagor's right to sell or transfer mortgaged property.** Whatever right the mortgagor has in the mortgaged property he may transfer or sell, subject, of course, to the mortgage. Since the mortgagor can sell his interest in the mortgaged property, it follows that he may give a subsequent mort-

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[2] Stewart v. Platt, 101 U. S. 731.

[3] Morrow v. Reed, 30 Wis. 81.

gage on it. When a chattel mortgage is given by a merchant or shopkeeper on a stock of goods in his store, there is usually an understanding that the mortgagor is to continue the business. He must then have the power to sell goods free from the lien of the mortgage. Such mortgagee usually expressly gives the mortgagor power to sell goods. A parol agreement that he may sell goods is sufficient, or power to sell may be implied from other terms of the mortgage. If the mortgagee, when there is no such power to sell, express or implied, knows the mortgagor is selling goods and does not try to prevent such sales, he will be estopped from denying their validity.[4]

**§ 13. Assignment of mortgage by mortgagee.** The mortgagee may assign the mortgage. Such assignment, to be legal, should be in writing or by a transfer of the instrument itself. But an assignment of the mortgage, without an assignment of the debt also, is a nullity, for the mortgage is a mere incident of the debt. On the other hand, an assignment of the debt should also include a formal assignment of the mortgage securing it.

**§ 14. Foreclosure of a chattel mortgage under power of sale.** Chattel mortgages usually contain an express power of sale, which may be exercised by the mortgagee after default. In most states, statutes provide that such sales shall be public after due notice has been given by publication of the time and place of sale. Such statutes must be strictly followed. In the absence of statute the only requirement as to a sale, under a power in a chattel mortgage, is that the sale be made with good faith and fairness as to the mortgagor.[5] The sale may be public or private, and notice to the mortgagor that such sale is to take place, though usually required, is not everywhere necessary. The mortgaged goods may be sold in a lump, or in parcels; but, if sold in parcels, the sale must be ended as soon as enough is realized to satisfy the mortgagee's claim, for its continuation would amount to an unlawful conversion of the remaining goods.[6]

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[4] Brooks v. Record, 47 Ill. 30.

[5] Robinson v. Bliss, 121 Mass. 428.

[6] 3 Denio (N. Y.) 33.

## CHAPTER VII.

## TITLE TO REAL ESTATE.

### Section 1. Form of Conveyance and Description of Property.

**§ 1. Policy of the law in regard to transfer of land.** It is the policy of the law to allow owners of land the greatest freedom possible in carrying out their wishes regarding the transfer of that which belongs to them. Hence, any form of conveyance of title which expresses an intention of the owner to convey to another will be sufficient, except so far as certain formalities are positively required upon particular grounds.

At common law the transfer of property in the possession of the grantor was accomplished by livery of seisin, as it was called, or actually or symbolically putting the purchaser in present possession. At present, in addition to a writing, the instrument must have a seal, and the transferee must have given some consideration, however small, in return for the transfer.

**§ 2. Usual forms of conveyance. Various kinds of deeds.** The usual form of conveyance is a deed or instrument under seal. Long usage has developed a somewhat stereotyped form of conveyance of real estate. Deeds are catalogued as "warranty deeds," "special warranty deeds" and "quit-claim deeds." The first have full covenants of warranty, which are elsewhere more fully explained (§ 32, below). The second contain covenants of warranty only against the acts of the grantor. The last contain no covenants of warranty at all. Deeds, whether warranty deeds or quit-claim deeds, are also catalogued as indentures and deeds poll. The former are executed in duplicate and are properly used where by reason of the deed containing covenants by the grantee, it is proper for the grantee to sign. The indenture is most commonly used in leases, which it will be observed, contain many

covenants by the tenant. The term indenture is, of course, derived from the fact that formerly the two parts of a deed were executed on parchment and then severed upon an irregular or identical line, so that by fitting the two parts together upon that line they could be identified as duplicate originals. Deeds poll on the other hand, are those executed only by the grantor.

§ 3. **Different parts of a deed.** Every well drawn deed of conveyance has at least a suggestion of the following parts:

1. The premises: In a deed poll the premises are "Know all men by these presents that I," or "To all to whom these presents shall come, Greeting! Know that I." Indentures on the other hand, recite that "This Indenture, made this ..... day of ..... by A. B., party of the first part, and C. D., party of the second part, Witnesseth."

2. The recitals: After the premises follow the recitals or introductory matter, preceded by the word "Whereas." The statement of the consideration is also properly classed with the recitals. The making of recitals in a deed must be done with care, because the parties are not permitted to deny the truth of the recitals. A qualification of this may be stated with respect to the recital of the consideration. Neither of the parties can deny that some consideration passed, but they are not bound by the particular figures mentioned as the consideration in the deed.

3. Words of conveyance: These include (a) the description of the property granted; (b) the words which indicate what estate is created; (c) the covenants for title; (d) the release of the wife's dower or husband's curtesy (the interest of the husband in his wife's lands, which corresponds to her dower interest in his lands see § 64, below); (e) the release of statutory exemptions; (f) the witnessing clause, signature, and seal; and (g) the acknowledgment.

§ 4. **Description of property granted.** Competent conveyancers spare no pains to see that the description of the property conveyed is without ambiguity or uncertainty. It is often compared and re-compared with a known correct description in an abstract of title, or with a surveyor's description and plat. The reason for this is obvious. If the description is defective, the whole conveyance fails. No other part of the instrument is so

vitally important. But even if the description is not wholly bad, the conveyancer is blameworthy who allows any question of construction or ambiguity to arise in respect thereto.

§ 4a. **Same: Some rules of construction.** If the premises conveyed are described by lots and blocks in regularly laid out and platted subdivisions, the description is according to the monuments of the subdivision duly noted on the plat, and in the case of subdivisions properly platted by competent surveyors, very little question as to description can arise. If, however, the premises must be described by metes and bounds, then it must be observed that if any conflict occurs between the monuments and the distances, or between the monuments and the courses, or the monuments and the contents, the monuments always govern ([7]). If there is any conflict between distances, courses, and contents, there is no rule, but the words of the deed and all the surrounding circumstances which throw light upon what the parties meant by the words they used must govern. If the result is still in doubt, resort may be had to the rule that the deed will be construed most strongly against the grantor, and whatever description will convey the most to the grantee will be taken.

§ 5. **Boundaries on waters and on ways.** In many jurisdictions the ownership of the bed of rivers, even rivers navigable in fact, is in the riparian owner. If he owns on one side only he will usually own only one-half of the bed of the stream. It is usual also, especially in rural districts, for owners abutting on the highway to own to the center of the highway, subject to the rights of the public to use the strip as a highway. When the owner abutting on the river or the highway transfers his holding, it is very common to leave it entirely ambiguous as to whether the fee to the middle of the way or river will pass. Thus if the grantor bounds the premises conveyed "along the river," "along the way," "to an oak tree on the river," "along the river shore" or "along the side of the highway," difficulties of construction may arise which might easily have been avoided by more careful description.

A contract for the sale of realty and some forms of conveyances are found on the opposite page, and the pages following.

[7] Pernam v. Wead, 6 Mass. 131.

## CONTRACT OF SALE OF REAL ESTATE.

ARTICLES OF AGREEMENT, made this *first* day of *March* in the year of our Lord One Thousand Nine Hundred and *Thirty-eight*, between *John Dickinson*, party of the first part, and *Walter Brown*, party of the second part: Witnesseth, That, if the party of the second part shall first make the payments and perform the covenants hereinafter mentioned on *his* part to be made and performed, the said party of the first part hereby covenants and agrees to convey and assure to the said party of the second part, in fee simple, clear of all incumbrances whatever, by a good and sufficient Warranty Deed, the lot, piece, or parcel of ground, situated in the County of *Cook* and State of *Illinois*, known and described as *Lot three (3) in Block twenty-four (24) in Charles H. Watkins' Subdivision of the City of Chicago, Section twenty-eight (28), Township thirty-nine (39), Range fourteen (14), east of the Third Principal Meridian*, and the said party of the second part hereby covenants and agrees to pay to the said party of the first part the sum of *One Thousand* Dollars in the manner following: *Five Hundred Dollars on the first day of April, 1938, and Five Hundred Dollars on the first day of April, 1939*, with interest at the rate of *five* per centum per annum, payable *semi*-annually, on the whole sum remaining from time to time unpaid, and to pay all taxes, assessments or impositions that may be legally levied or imposed upon said land, subsequent to the year *1938*. And in case of the failure of the said party of the second part to make either of the payments, or any part thereof, or perform any of the covenants on *his* part hereby made and entered into, this contract shall, at the option of the party of the first part, be forfeited and determined, and the party of the second part shall forfeit all payments made by *him* on this contract, and such payments shall be retained by the said party of the first part in full satisfaction and in liquidation of all damages by *him* sustained, and *he* shall have the right to re-enter and take possession of the premises aforesaid.

It is Mutually Agreed, By and between the parties hereto that the time of payment shall be the essence of this contract and that all the covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties.

In Witness Whereof, The parties to these Presents have hereunto set their hands and seals, the day and year first above written.

*(Signed) Walter Brown.* [SEAL]
*(Signed) John Dickinson.* [SEAL]

Sealed and Delivered
in Presence of
*(Signed) William Groman.*
*(Signed) John Hinnekeray.*

RELEASE DEED.

KNOW ALL MEN BY THESE PRESENTS, That *I, Harry Jones, of the City of Chicago in* the County of *Cook* and State of *Illinois,* for and in consideration of one dollar, and for other good and valuable considerations, the receipt whereof is hereby confessed, do hereby remise, convey, release and quit-claim unto *John Dale of the City of Chicago, in* the County of *Cook* and State of *Illinois* all the right, title, interest, claim or demand, whatsoever *I* may have acquired in, through or by a certain *Trust* Deed, bearing date the *second* day of *October,* A. D., *1937,* and recorded in the Recorder's Office of *Cook* County, in the State of *Illinois,* as Document No. *4,865,428* in Book *11,862* of *Records* on page *125,* to the premises therein described, as follows, to-wit: *Lot two (2) in Block twenty-one (21) in Charles H. Watkins' Subdivision of the City of Chicago, Section twenty-eight (28), Township thirty-nine (39), Range fourteen (14), east of the Third Principal Meridian,* situated in the *City of Chicago,* County of *Cook* and State of *Illinois,* together with all the appurtenances and privileges thereunto belonging or appertaining.

Witness *my* hand and seal, this *fifth* day of *March,* A. D., *1938.*

*(Signed) Harry Jones.* [SEAL]

State of *Illinois* }
*Cook* County. } ss.

I, *James H. Hawkins, a Notary Public,* in and for the said County, in the State aforesaid, DO HEREBY CERTIFY, that *Harry Jones,* personally known to me to be the same person whose name *is* subscribed to the foregoing Instrument, appeared before me this day in person and acknowledged that *he* signed, sealed and delivered the said Instrument as *his* free and voluntary act, for the uses and purposes therein set forth.

GIVEN under my hand and *Notarial* seal, this *fifth* day of *March,* A. D., *1938.*

*(Signed) James H. Hawkins,*
*Notary Public.*

(SEAL)

## RELEASE OF MORTGAGE.

KNOW ALL MEN BY THESE PRESENTS, That *I, John Ellis, of the City of Chicago, in* the County of *Cook* and State of *Illinois,* DO HEREBY CERTIFY, That a certain Indenture of Mortgage, bearing date the *second* day of *October,* A. D., *1937,* made and executed by *Henry Holland, of the City of Chicago, in the County of Cook, and State of Illinois, party* of the first part to *John Ellis, of the City of Chicago, in the county and state aforesaid, party* of the second part, and recorded in the Recorder's Office of *Cook* County, in the State of *Illinois* in Book *1862* of Records, on page *124* on the *second* day of *October,* A. D., *1937, as document No. 4,865,427 and conveying land in Cook County, Illinois,* is, with the notes accompanying it, fully paid, satisfied, released and discharged.

WITNESS, *my* hand and seal, this *first* day of *March,* A. D., *1938.*

*(Signed) John Ellis.* [SEAL]

State of *Illinois*
*Cook* County, } ss.

I, *James H. Hawkins, a Notary Public* in and for the said County, in the State aforesaid, DO HEREBY CERTIFY, that *John Ellis,* personally known to me to be the same person whose name *is* subscribed to the foregoing Instrument, appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said Instrument as *his* free and voluntary act, for the uses and purposes therein set forth.

GIVEN under my hand and notarial seal, this *first* day of March, A. D., *1938.*

*(Signed) James H. Hawkins,*
*Notary Public.*

[SEAL]

QUIT CLAIM DEED.

THIS INDENTURE WITNESSETH, that the Grantor, *John Dickinson*, of the *City of Chicago* in the county of *Cook* and State of *Illinois* for the consideration of *One Thousand* Dollars, Conveys and Quit-Claims to *Walter Brown*, of the *City of Chicago*, County of *Cook* and State of *Illinois* all interest in the following described Real Estate, to wit: *Lot three (3) in Block twenty-four (24) in Charles H. Watkins' Subdivision of the City of Chicago, Section twenty-eight (28), Township thirty-nine (39), Range fourteen (14) east of the Third Principal Meridian*, situated in the County of *Cook* in the State of *Illinois*, hereby releasing and waiving all rights under and by virtue of the Homestead Exemption Laws of this State of *Illinois*.

Dated, this *fifth* day of *May*, A. D., *1938*.

*(Signed) John Dickinson*, [SEAL]

MUST BE ACKNOWLEDGED AS ABOVE.

## Section 2. Estates and Interests Created.

**§ 6. Classification of estates.** Estates in real property are commonly classified as follows: (A) Freehold, comprising (1) estates of inheritance [divided into (a) fee simple and (b) fee tail], and (2) life estates; (B) less than freehold, comprising (1) estates for years, (2) estates from year to year, (3) estates at will, and (4) estates at sufferance. A further subdivision of life estates will be found in § 10, below.

A freehold is an estate of uncertain duration, which may continue as long as some particular human life, and which is not terminable solely at the will of the grantor or owner of the reversion. An estate of inheritance is a freehold which on the death of the owner will descend to his heirs if undisposed of by will. An estate for 1,000 years is not a freehold (save by statute), though much longer than a life, because its duration is not uncertain. An estate until A marries, or as long as he continues to dwell in a certain place, is a freehold because its duration is uncertain and it may also last as long as A's life.

**§ 7. Fee simple.** The most complete estate of ownership is known as a fee, or estate in fee simple. It is a freehold in perpetuity. Under modern statutes a simple gift to A, whether by

deed or will, prima facie is effective to confer a fee simple upon the grantee or devisee, and other words must be found to cut down the interest to a less estate. Conveyances to modern business corporations confer a fee without the use of any words beyond the name of the corporation. It is customary, however, to put after the words of conveyance to the corporation "and to its successors and assigns forever," so as to indicate more clearly an intent to confer an absolute interest.

§ 8. **Fee tail.** A fee tail, or estate tail, is an estate which descends to the heirs of the body of the first grantee, and so on indefinitely to the heirs of the body of each taker so long as any such line of lineal heirs continues to exist. In such jurisdictions of this country as still permit estates tail, a simple conveyance in fee by the tenant in tail will operate to transfer a fee simple. In most states statutes, which began in this country about a century ago, abolish estates tail entirely and declare that whatever would have been an estate tail according to the rules of the common law, shall be a fee simple. Other statutes provide that he who would have been a tenant in tail by the rules of the common law shall have a life estate, and that on his death the remainder shall pass in fee simple absolute.

§ 9. **Life estates.** Any words expressing an intent to confer upon a grantee or devisee an estate for the life of the grantee or devisee, or for the life of another, will be given effect. It should be noted, however, that life estates include much more than estates for the life of any individual, or the lives of any individuals, for if an estate is created for any uncertain period which is not an estate terminable at the will of the grantor or reversioner, it is technically classed with life estates. Thus, an estate for so long as the possessor shall please, is technically classed with life estates and not with estates at will.[1]

§ 10. **Classification of life estates.** Life estates are usually divided into two classes: (A) Conventional (created by act of the parties), including (1) estates for the life of the grantee, and (2) estates pur autre vie (for another's life); (B) legal (created by operation of law), including (1) curtesy, and (2) dower. A grant to A for his life, when conveyed by A to B, becomes in

[1] Beeson v. Burton, 12 C. B. 647.

B's possession an estate pur autre vie (for the life of A). Estates by curtesy and dower are treated in §§ 64-66 below.

**§ 11. Joint ownership.** The only joint interests now in common use are joint tenancies and tenancies in common. The joint tenancy has the attribute of causing the whole interest to remain in the hands of the surviving joint tenant when any joint tenant dies. Thus, if a conveyance be made to A, B and C as joint tenants, and A dies, B and C are joint tenants of the whole estate and A's heirs or devisees take nothing. When B dies C has the whole estate, and on C's death the title passes by descent to his heirs, or by devise according to his will. On the other hand, when A, B, and C are tenants in common, each has an undivided separate interest which upon his death he may devise, or which will pass to his heirs by descent.

Nowadays joint tenancy is usually desired where title is taken by a husband and wife, and where each desires the other to have the real estate in case he or she dies first. In such cases it is most convenient to convey to both as joint tenants. In making a conveyance to two or more persons it should always be specified whether the estate is to be a joint tenancy or a tenancy in common. If nothing is stated the inference now is that a tenancy in common is meant, though the old common law rule was otherwise. To create a joint tenancy it is necessary therefore to say in terms that A and B are to hold as joint tenants. Conveyancers frequently add the words "and not as tenants in common."

## Section 3. Creation of Easements.

**§ 12. Easements.** Closely associated with the creation of estates by deed is that of the creation of easements in deeds transferring title to a part of the estate belonging to the grantor, while the grantor retains the balance. Suppose, for instance, that A is the owner of lots one and two and uses a way for his residence on lot one over lot two to the highway.

The way from lot one over lot two is not an easement, because of the unity of title in A. A cannot have an easement over his own land. If A conveys lot one to B, it is important that B have the same right to use the way over lot two that A always had.

Otherwise he may have no access to the highway. The proper course for B to pursue is to require A in his deed expressly to grant him a right of way over a defined strip to the highway. It will not be a sufficient express grant of an easement to B to convey to B lot one "together with all and singular the hereditaments and appurtenances thereunto belonging."

If A conveys lot two to B, it is important for A himself to secure the grant of an easement to himself from B at the time B becomes by the conveyance the owner of the lot over which the way lies. The safe and proper way to do this is to use a deed, in form an indenture, containing a distinct grant to the party of the first part of an easement over lot two by the party of the second part (the grantee of lot two) in favor of lot one, and then to have this deed signed and sealed by the grantee as well as the grantor. In this way the grantee B, by the same instrument by which he receives title to lot two, duly and properly creates an easement over it in favor of the owner of lot one.

**§ 13. Restraints on alienation.** Sometimes the grantor or testator, in order to conserve the estate, declares in the deed or will that the estate created shall not be alienable. This is an attempt to prevent the operation of the usual laws permitting alienation. If this were effectual the holder of the estate could not get rid of it. Such attempted restraints on alienation are, however, wholly void and unenforceable. It makes no difference whether the interest subject to the attempted restraint be a fee simple, or a life estate or a term for years. The restraint is void. Whatever interest one has in land he may transfer, and his creditors can take it from him for the satisfaction of his debts.

**§ 14. "Spendthrift trusts."** Within the last century and a half, however, conveyancers have been called upon to devise some way, consistent with the above rule, by which the spendthrift member of a family might have the benefit of an income which he could not waste and which his creditors could not reach. This is the best they have been able to do: The grantor or testator can transfer property to trustees to pay the income wholly, or in part, or not at all, to such one or more of A, his wife, and children, during the life of A, as the said trustees in their discretion shall see fit; and, in case the whole or any part of the in-

come is not paid to any person, to accumulate the part not paid and add it to the principal. Then the grantor provides for the distribution of the principal after A's death. The above settlement leaves A with nothing. If he becomes bankrupt the trustees can refuse to give A anything, and A's creditors will get nothing. The trustees can then begin to pay the income to A's wife and children. Of course, in that event A is deprived of all income. That cannot be helped, but at least A's family is protected against A's creditors.[2] It is important in carrying out this plan that A be given no rights whatever that he can enforce, for if A has any such rights his creditors can reach them. Thus, where the trusts were to use the income to purchase clothing, board, and lodging for A, A could compel the trustees to use their discretion in expending the money for him in the way specified, and the creditors could reach that right for their benefit.[3]

### Section 4. Drafting a Will.

**§ 15. Introduction.** Some of the subject matter of the preceding sub-sections is, it will be observed, very closely connected with the art of drafting wills. In fact, most of the questions discussed arise in connection with the constructions of wills and the estates which may be created by them. The matter presented does not, however, give one any idea of the practical art of will-drawing or of making family settlements. To obtain that one must come at the subject from the practical point of view of what is best to be done, and how to do it so as to avoid the very difficulties that have been discussed. No better method of introducing the reader to the niceties of the practical art of will-drawing exists, it is believed, than that of letting him in behind the scenes to observe the actual mental processes of the draftsman in getting up a typical instrument for a typical testator, and examining the actual phrases which the draftsman uses in making the instrument. The following is submitted, not with the idea that it will enable a person to actually prepare his will without legal advice, but for the purpose of enabling him to assist in its prepa-

[2] Lord v. Bunn, 2 Y. & C. C. C. 98.
[3] Green v. Spicer, 1 Russ. & M. 395.

ration by means of an intelligent discussion with his counsel, who, of course, is assumed to be familiar with the questions discussed in this chapter, as well as with many others which do not find a proper place in a work of this nature. Such matters as the formal requirements of a valid will, and the very many technical rules of law governing the devise of real property by will, are best left to the practitioner.

The illustration which is found on the following page shows a will in about as simple a form as possible. The words, "give, devise and bequeath," are the words commonly used to pass all the testator's property; "devise" being the technical word applying to real property, and "bequeath," to personal property. In addition, it is common to specify, instead of "all my property real and personal," "all my property, real, personal, and mixed." It may be noted that the will speaks of a seal, although none appears after the testator's signature. A seal is not required except in only one or two states. The last paragraph is called the "attestation clause," and it is of the greatest importance to see that it conforms to the statutory requirements, and that the witnesses subscribe to it in the manner required. Some statutes require three attesting witnesses, instead of two.

I Edward H Harriman of Arden in the State of New York do make publish and declare, this as and for my last Will and Testament, that is to say, —— I give, devise and bequeath all my property real and personal of every kind and nature to my Wife Mary W Harriman to be hers absolutely and forever and I do hereby nominate and appoint the said Mary W Harriman to be executrix of this Will ——

In Witness Whereof I have hereunto set my hand and seal this eighth day of June in the year nineteen hundred and three ——

Edward H Harriman.

Signed, sealed, published, and declared by the Testator as and for his Last Will and Testament in our presence, who at his request and in his presence and in the presence of each other have each of us hereunto subscribed our names as witnesses ——

Chas A Peabody, 13 Park ave. NY,
C C Tegethoff 291 East 17th St Flatbush L.I.

**§ 16. The typical testator.** The typical testator selected is a man of moderate fortune. He has at least a country house or a town house—perhaps both. The capital of his estate consists of lands and personal property in suitable proportions. A proper proportion of the real estate is productive, and the personal estate is invested suitably in public securities, mortgages, bonds of railway corporations, and some of the better-known and readily salable stocks. Our typical testator is forty years of age, and neither a bachelor nor a widower. Both are abnormal variations at this age. Furthermore, there is no question of race suicide. He is the father of three young children—two boys and a girl—and has a fair prospect of more of each kind.

**§ 17. Evolution of methods of conveyancing appropriate for the typical will.** The typical testator probably does not know that the best testamentary disposition for him to make has been settled, like the rules of law, by generations of experience and experiment on the part of trained specialists. The results of this experience and experiment, as well as the evolution which it has produced, are to be found in the form books of the English conveyancers of every generation since the reign of Charles II. The plan prescribed for him in the seventh volume of the last edition of Bythewood or in the fourth volume of a recent edition of Davidson's Precedents is the crowning effort of an evolution which dates back to the latter part of the seventeenth century. The founder of that school of conveyancers which has produced the form we are about to consider in detail was no other than Sir Orlando Bridgeman, afterwards lord keeper of the great seal from 1667 to 1672. He is called the father of modern conveyancing. Since the time of Bridgeman there has been a succession of conveyancers, conveyancing counsel, and chancellors who have added to, pointed the way for, or insisted upon improvements in the form of family settlements. To the American lawyer the names of Fearne, Preston, Butler, Smith, Hayes, Davidson, Bythewood, Jarman, and such chancellors as Lord Hardwick, Lord Eldon, and Lord St. Leonards, are familiar.[4]

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[4] See "History of Settlements of Real Estate," 1 Juridicial Society Papers 45, 54.

We are to consider then what this evolutionary process has settled as the best course for a typical testator to take.

**§ 18. General outline of the will.** This has long since been settled. After the gift of specific legacies, the wife shall have an interest in the whole of the residue for her life or until she marries again, and, after her death or re-marriage, the whole property shall be divided equally among the children of the marriage. Nothing could be more direct and simple than this, and yet the infinite care and attention to detail with which the English conveyancers since the time of Charles II have worked out this typical form of will makes it today a wonder to behold.

**§ 19. The will in detail: Specific legacies.** The first care of the draftsman is to allow the testator to bequeath as he pleases a few specific chattels—a watch to one, a picture to another, books to a third, and so forth. There is only one restriction upon the testator here. He must make his gifts absolute. He must not attempt any gifts of chattels to one for life and then to another. Such gifts are valid, but extremely annoying to both parties interested and unwise from other points of view. If the testator has any poor female relative or relatives whom he wishes to provide for he may then charge upon his estate or direct the purchase of a small annuity for their benefit. At this point the personal choice or preference of the testator largely, if not entirely, ceases.

**§ 20. Gift of household effects to the widow.** Here some difficulties in the use of language must be faced. It is, of course, impracticable to put into the will an inventory of all the household effects which are to go to the widow, for they might all wear out and be replaced by the time of the testator's death. General descriptive language must be employed. The articles must be described with reference to their existence at a certain locality or without reference to locality. The former is a very usual method and the one adopted in the will of the late Marshall Field. In either case, however, difficulties arise. If the clause be drafted so as to leave all the residue of the testator's effects which shall be in and about a certain dwelling at the time of his death, he may include much more than he intends, viz., money, or securities for money, bonds, stocks, and other personal property

of that nature, in a private safe upon the premises. It is well, therefore, after a general gift of "all my wines, consumable stores, household furniture, household linen, plate, china, books, and other effects which shall be in and about my house at ....." to except "money, securities for money, stocks, evidences of indebtedness, and documents of title." In the will of the late Marshall Field this same object was effected by the following enumeration: "Furnishings and equipments of every kind, including furniture, paintings, library, bric-a-brac, horses, carriages, and all other personal property which may be used in connection with said residence at the date of my death." If the testator does not restrict the gift to articles at a given locality, he must still use some general word such as "effects." This may include too much, viz., the whole personal estate of money, stocks, bonds, notes, etc. The general words must, therefore, be selected with the greatest care. Experience has suggested the following, after an enumeration of the ordinary household articles: "The last mentioned bequest shall comprise all effects, though not strictly household, which are applicable to personal or domestic use, ornament, occupation, or diversion and are not hereinbefore specifically bequeathed."

§ 21. **Same: Absolute gift or life estate?** The usual practice of English conveyancers is to make the gift of effects to the wife an absolute one. A gift to her for life was valid enough, but the practical inconveniences of it were too great. In the first place, the subject matter of the gift is to a very considerable extent perishable, so that the one ultimately entitled cannot in the usual course expect to enjoy it. This gives rise to the requirement that effects of a certain character must be sold, the proceeds invested, and the income only used by the widow during her life. Difficult questions arise as to what articles must be treated in this way. Finally, there is always the opportunity of friction between the life tenant and those entitled afterwards. If the testator insisted upon the widow having a life estate only in these chattels, it was customary to bequeath all such as were of a permanent character and not likely to wear out or disappear in the using to trustees to permit the widow to use them during

her life or widowhood.[5] It is a matter of remark, therefore, that in the will of the late Marshall Field the gift of household effects to the widow includes all sorts of effects, both those likely to be consumed in the using and those of a permanent character, and creates in the widow an interest for life without the intervention of trustees.

**§ 22. Disposal of the residuary estate: Powers to trustees.** The first step is to devise all the rest and residue of the estate, real and personal, to trustees who are named, and to expressly provide what powers they shall have. Here experience has constantly added provisions which enable those administering the estate to proceed with the least possible inconvenience. The trustees represent the estate to the outside world. Whatever acts the holder of such a property must ordinarily execute in its profitable administration, the trustees must be given express power to perform. There must be power to lease, to sell, to exchange, to mortgage, to pay off encumbrances, and to make a voluntary partition of lands which the testator may hold in common with others. In their relation to the trust estate the trustees must be given directions as to the investments to be allowed, whether within a restricted, fair, or comprehensive range. There then must be a power to vary investments, to buy land, and to sell the same again. It was wise, also, to confer power upon the trustees to apply the proceeds of any sale of real estate to pay off encumbrances upon the property sold or any other property in the trust estate. Powers to partition the trust premises among the beneficiaries at the time of distribution and to allow the widow to reside in a particular residence of the testator during the time when she was entitled to the income from all or any part of the trust estate by the terms thereof, without paying rent, were appropriate and advisable.

**§ 23. Income from trust estate to be paid to widow: Support of children.** It is of course expected that the widow will support, maintain, and educate the children out of her income so long as they remain minors, yet the conveyancer, who left nothing to chance, gave the children a legal right to such support, maintenance, and education, by charging the widow's income with the

[5] Davidson's Precedents (1880), Vol. IV, p. 67.

expense of such as she in her discretion might deem it proper they should have. The principal question, however, which arises in regard to the trust for the widow is: How long shall the income be paid over to her? Shall it be during the remainder of her life, or merely during her widowhood, i. e., so long as she remains unmarried? For many generations the English conveyancers seem to have had but one opinion about this—that the widow's interest should terminate with her second marriage. There can be only two results of continuing the whole income to the wife after her second marriage: Either she will have more than she properly needs, or the income will make up the deficiency in her second husband's income. It is the somewhat usual American practice, however, to give the income to the wife so long as she lives.

**§ 24. The widow's special power of appointment: Hotchpot clause.** The English form books usually provide for a special power in the widow to appoint such part or all of the residuary estate among her children as she shall see fit. In drafting such a clause some care is required. It must be clear that the widow may appoint to one or more exclusively of the others, otherwise an appointment of the whole interest which leaves out any one will be wholly void. The power must be to appoint not only to children, but to more remote issue, and in such manner and form as the widow shall deem best.

The existence in the will of a power in the widow makes necessary, at a later stage of the will, what is known as a "hotchpot clause." According to the usual course the widow appoints something to the daughters when they marry, or to the sons when they reach twenty-one or twenty-five. It not unfrequently happens, therefore, that out of a family of, say, four, the first three have received appointments at the death of the widow. Let us suppose that these appointments have amounted to $20,000 apiece and that at the death of the widow there is a balance of $60,000 in the estate. This latter sum must be divided among all the four children, so that the three who have already received appointments will have altogether $35,000 apiece, while the youngest child must be satisfied with only $15,000. This is neither what the testator intended nor as the widow planned. The hotch-

pot clause is designed, under the exigencies described, to effect an equal division as nearly as possible. It, therefore, provides that no one who took by appointment should (in the absence of an express direction in the appointment to the contrary) share in the unappointed part without bringing his appointed share into the general fund—that is, into hotch-pot—to be distributed as in default of appointment.

§ 25. **Same: Expediency of such a power.** As to the expediency in general of giving the widow this power of appointment, opinions may differ. It's use may be most salutary. It enables the widow to retain control over the children. She may alter the disposition of the property according as events turn out. If the daughters marry well their shares may be reduced. If a son is wild his portion may be cut down to a life estate, with clauses which will save the estate from his creditors and provide for his wife and children. On the other hand, if the testator's children are normal individuals, but the widow proves flighty or partial, or lives to a great age and falls under the influence of some single child who lives with her when all the others have moved away, great disturbance in the family may result from the existence of the power. The American tendency has been to omit the power, unless there is some very strong reason for it.

§ 26. **Gift to children in default of appointment after termination of widow's interest: Objects sought.** The testator is apt to think only of a simple direct gift to his children. When, however, he is reminded that his family is a young and growing one, it will occur to him that the trust must not terminate for each child till he or she comes of age, and perhaps he may desire that it shall not end for the different shares except as the children reach twenty-five. Should any of the children die under twenty-five he will wish their children, if any, to take the parent's share; and the shares of his childless children dying under twenty-five are to be divided among the other children who reach that age. The problem is to effect these desires as simply and conveniently as possible.

§ 27. **Same: Accomplishment by postponed vested gift.** Scientific modern conveyancing recognizes that these objects may be accomplished in just two ways, which must be kept absolutely

distinct and separate. The first method is to make a direct gift to all the children to take effect immediately upon the death or remarriage of the widow. That will give each child what is known as a vested interest. Each will have a share at once upon the testator's death, subject to the provision for the widow. Then there will be a clause simply postponing the termination of the trust and the payment over of the principal of each share, till the beneficiary of that share reaches twenty-five. If the will stopped here each child would have full power to alienate after it came of age, by deed or will; and upon the child's death intestate at any time the share would descend to its next of kin. If, then, any child of the testator dies under twenty-five, leaving children, there is no reason why the child's right of alienation should be interfered with, for he will naturally alienate to his children by will or the share will descend to them. The deceased child's portion may, therefore, be left to descend or to pass by will. On the other hand, if a child of the testator dies without leaving issue, it is proper that the share of the child so dying should go to the other brothers and sisters. This requires a special provision, known as a clause of "accruer," declaring: "In case any of my said children shall die without leaving issue surviving them, the share hereinbefore given to the child so dying, including any further share or shares accruing under this present clause, shall go and accrue to my other children."

**§ 28. Same: Accomplishment by contingent gift.** The second plan for the gift to the testator's children is to describe the class who are to take, and to make it, as far as possible, contingent upon each member of the class reaching the age of twenty-five—the time of distribution. According to this plan the devise will read:

"To such child or children of mine as shall survive me and attain the age of twenty-five, and to the child or children of any child or children of mine who shall be dead at my death or shall die under the age of twenty-five; provided that the child or children collectively of any child of mine dead at my death or dying under the age of twenty-five shall take only such share as his, her, or their parent would have taken, if such parent had lived to take a vested interest."

Both these plans—that of a vested gift with a clause of accruer and that of a contingent gift—accomplish precisely the same result, but by quite a different series of clauses which must not be mixed with each other or hopeless confusion and litigation will result. The English conveyancers now almost wholly prefer the second plan, and its further development has been carefully worked out.

**§ 29. Same: Development of latter plan.** The reader will observe that, while the gift to the children of the testator was made contingent on their reaching twenty-five, the gift to the child of any deceased child of the testator is made to it absolutely. The reason for this is that a gift to the child of any deceased child of the testator, on such grandchild reaching the age of twenty-five, would be in violation of a technical rule of law which prohibits the making of a devise to take effect more than twenty-one years after the death of the widow and all the testator's children. Nevertheless, the general plan requires that all gifts be postponed, if possible, till the legatee reaches twenty-five. The ingenuity of more recent conveyancers has devised this clause, which does the work simply and effectively:

"Provided always: That if any grandchild or grandchildren of mine should attain the age of twenty-one years before the expiration of twenty-one years from the time of the death of the survivor of my children and more remote issue (if any) living at the time of my death, then the vesting of the share of each such grandchild shall be postponed to the expiration of such time of twenty-one years, or until the attainment by such respective grandchild to the age of twenty-five years, whichever shall first happen." Then follows a clause giving the shares of grandchildren who died before obtaining a vested interest, to their children, if any.

**§ 30. Disposition of income prior to time of distribution.** Whichever plan be adopted—the one where the gift is vested or the one where it is contingent—the provision for the children and other issue is still incomplete. As none are to take till they reach twenty-five (except in the case of great-grandchildren) what is to happen between the termination of the widow's interest and that time? Obviously the income upon the vested or expectant share

of each child or grandchild is to be used for its maintenance and education. This is accomplished by a general direction to the trustees thus to apply such part of the income as seems best, or to pay it to the parents or guardians of the persons entitled, to be by them thus applied. If all of the income of any share is not thus spent, it may be directed to be accumulated for the benefit of its share, subject to any future use for maintenance and education of the one entitled authorized by the trustees. Power should also be given the widow and trustees to use for similar purposes any necessary part of the principal, or even to make an advancement to children on certain occasions.

**§ 31. Routine clauses. Summary.** The balance of the will contains some routine clauses, declaring that the gift of the wife shall be in lieu of all interest which the law allows her, providing a method of supplying the place of a trustee who dies or becomes incapable or refuses to act, and naming executors.

This, then, as Davidson says in his Precedents, is an outline "of a will of the simplest and most ordinary description." It is nothing but a gift to the widow for life or during widowhood, and then to the children. It is what testators do or are planning for every day. Almost anything, however, is more easily conceivable than that the layman who contemplates such a testament should ever imagine the perfection of form and detail to which an instrument on these simple lines can be brought. Through experiments and mistakes of the past, generations of a trained, experienced and skilful professional class have evolved what is best for the purpose. With a will drawn according to the ideal thus wrought out, the question of testamentary disposition may in most cases safely be dismissed from his mind by the testator during the remainder of his life.

### Section 5. Covenants for Title. Execution of Deeds.

**§ 32. The modern covenants of title.** These are as follows: 1. Covenant of seisin (or possession): this is a covenant that the grantor is "seised" at the time of the grant. In most jurisdictions this covenant is only satisfied by a lawful possession of the grantor. In some jurisdictions, however, it is satisfied (by reason of the survival of the feudal definition of seisin) by a wrong-

ful possession of the grantor. 2. Covenant of the right to convey: this is not the same as the covenant of seisin, because one may have a right to convey under a power to appoint, for instance, and yet not have any seisin or possession. 3. Covenant against incumbrances: this is self-explanatory. It is a covenant that there are no incumbrances upon the land conveyed. 4. Covenant for quiet enjoyment: this is a covenant that the grantee shall not be disturbed by any one claiming through the grantor. It is only broken when one enters claiming under the grantor. 5. Covenant for further assurance: this is not so common in this country as in England. It is a covenant to make further conveyances to remove clouds or clear up the title. 6. Covenant of warranty: this is peculiar to the United States. In scope it is similar to the covenant for quiet enjoyment, except that it is a covenant that the grantee shall not be disturbed by any one claiming a superior title. It is the general warranty of good title as against all the world.

Formerly all these covenants were spelled out at length in the draft of every warranty deed. The prolixity of deeds thus engendered was unnecessary, because the form and substance of the covenants were the same in all instruments. A sensible reform has been effected by means of statutory forms of conveyance, wherein the use of the one word "warrant" in the phrase "warrant and convey" is sufficient to introduce into the deed practically all of the covenants above mentioned except perhaps the covenant for further assurance. Frequently statutes provide that the use of the words, "grant, bargain, and sell" in a deed will operate to incorporate into the instrument a covenant of seisin, a covenant against incumbrances, and a covenant of quiet enjoyment against any claiming under the grantor.

**§ 33. Covenants of title run with the land.** It is a matter of no particular remark that the original parties to the covenant for title can sue and be sued. It is, however, one of the special attributes of these covenants for title that the benefit of suing on them exists not only in the original grantee, who was a party to the deed in which the covenants were contained, but also in any other person to whom the original grantee conveys his title and to whom his title comes by a regular chain of conveyances from

him. The benefit of the covenants is thus said to "run with the land."

**§ 34. Same: Burden of covenants for title.** The burden of the covenant—that is, the duty to respond in damages upon its breach—remains in the grantor during his life. How far does it bind his heirs? The rule of the common law was that, since the covenant was in an instrument under seal, if it purported to bind the covenator's heirs and assigns, as it practically always did, the covenantor's heirs would be bound to the extent of assets descending to them from the covenantor. To that extent, then, the burden of the covenant passed to others than the covenantor.

**§ 35. Statutory provisions regarding execution of deeds.** The differing detailed provisions of the laws of the different states relative to the execution of deeds make any attempt to state the law fully and precisely out of the question. This subsection consists rather of a series of conveyancer's cautions than an attempt to state the rules of fifty different jurisdictions.

A conveyancer always remembers that a deed of conveyance of land must be executed according to the formalities of the state where the land is situated. He knows the law of his own state. What does he do when he wants to know the law of other states? He may, of course, consult the statutes of another state, but that would be a long and difficult task, because a great many different provisions might affect the execution of deeds, and they may be widely separated under different heads in the statute books. They are not apt to be all known or readily referred to except by local practitioners who have all their lives been in contact with the law of that particular jurisdiction. If the matter is of very great importance the conveyancer desiring to draft an instrument in conformity with the laws of a neighboring jurisdiction may take the advice of local counsel in that jurisdiction. If, however, it is a small matter, like the formalities of a warranty deed conveying a fee simple, he will frequently obtain full satisfaction by consulting the current volume of a legal directory or mercantile agency. Either contains a summary of the law of each state with respect to the formalities for the execution of deeds. It purports to be prepared by competent local attorneys, and the profession has come to rely upon that fact.

There will be found a great variety of provisions about seals. Some jurisdictions require seals and some do not. Some states that require seals will not take a pen scroll for a seal, but insist upon a wafer being attached. In other states a pen scroll is enough. In some a seal printed on the blank form of deed is sufficient, and in others it is not. The different provisions for waiver of a wife's dower or a husband's curtesy, and the waiver of statutory exemptions of homestead property; the different forms for the acknowledgment of a deed by the parties; and the different modes of insuring the recognition of acknowledgments taken in a neighboring jurisdiction, all present a variety of detail which it is impossible to state in the mass.

**§ 36. Delivery and acceptance necessary.** The signing and sealing of a deed—even the signing, sealing and acknowledging of a deed—does not make it effective as the legal act of the grantor. To do that there must be a delivery and an acceptance.

**§ 37. Delivery to grantee.** There can be no delivery till the instrument has been placed entirely out of the control of the grantor. This usually occurs by the final handing of the instrument to the grantee or his agent.

Many difficulties of fact arise as to whether the deed has been placed out of the control of the grantor, especially where the transaction is between a husband and wife. After the death of the husband the deed is recorded, and the question is raised whether it was delivered before the husband's death. The wife is practically always an incompetent witness as against the heirs of the husband, so that the whole question comes down to one of circumstantial evidence with respect to the place where the unrecorded deed was kept. Often the testimony is of a picturesque character. The question turns upon whether the instrument was kept in the top bureau drawer with the wife's lingerie, or in the second drawer with the husband's red shirt. But observe that the placing of the instrument in the hands of the grantee does not necessarily constitute a delivery, unless by that act the instrument is placed entirely out of the control of the grantor. Thus, if the instrument be placed in the hands of the grantee as the grantor's messenger or servant or agent, to take the instrument to town and there hand it to another agent of the grantor, there is

no delivery. On the other hand, delivery may possibly occur without any actual physical removal of the deed from the grantor's hands. For instance, if he in the presence of the grantee says: "Here is the deed; I deliver it to you, but if you wish I will keep the instrument safe for you. Here is my receipt to you for it, and you may have it at any time on demand. In the meantime I will keep it in my safe for you." Under such circumstances the grantor has turned himself into the bailee or custodian of the paper for the grantee, and the delivery is complete.[6] But the cases where this actually appears are rare.

**§ 38. Delivery upon condition to third party: Escrow.** The placing of the instrument in the hands of a third party, to be delivered by him finally to the grantee upon the happening of certain conditions, is frequent. Thus, where the deed is placed in the hands of a third party and absolutely beyond the legal right of the grantor to recall the instrument except upon the non-happening of the condition, the grantee is entitled to the deed upon the happening of the condition and the title is good in the grantee by relation back to the time of delivery to the third party. The delivery upon condition to a third party in this manner is called a delivery in escrow, and the third party is the escrowee. There are two principal difficulties which arise in regard to escrows, which are considered below.

**§ 39. Same: Violation of condition by escrowee.** Suppose the escrowee delivers the instrument in violation of the condition to the grantee, and the grantee conveys to one who pays full value and has no notice of the improper action of the escrowee. Does such bona fide purchaser for value obtain any rights as against the grantor who delivers the deed in escrow? The older law, which proceeded upon the premise that no title passed until there was a delivery by the escrowee pursuant to the condition, was obliged to say no.[7] Respectable courts are to be found, however, which insist upon protecting the bona fide purchaser for value,[8] though the precise theory does not yet authoritatively appear.

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[6] Doe d. Garmons v. Knight, 5 B. & C. 671.

[7] Smith v. South Royalton Bank, 32 Vt. 341.

[8] Schurtz v. Colvin, 5 Oh. St. 274.

§ 40. **Same: Ambiguous delivery.** Great inconvenience and often expensive litigation ensue when the grantor, who delivers his deed to a third party, leaves it ambiguous whether he has placed the istrument absolutely out of his control or has reserved a right to recall it. This ambiguity arises in the cases where a father, not wishing to hazard the uncertainties of will-making, makes a deed conveying his farm to his children equally. He keeps the matter secret, and, not wishing to be deprived during his lifetime, he places the deed in the hands of some neighbor or justice of the peace or lawyer, with instructions to deliver it to his children at his death. If at this time he reserves the right to recall the intsrument, as he frequently does, the instrument cannot be valid as a deed at his death, because it was never delivered before his death. The instrument was never put out of the control of the grantor beyond his right to recall it. As a matter of fact, the whole transaction on the part of the grantor is an attempt to make a will. He has attempted to dispose of his property at the time of his death and he has made that disposition revocable at any time during his life. This precisely complies with the definition of a testamentary act. The difficulty is that the deed is not attested and executed as is required in order to make it effective as a will. Even if it be properly attested and executed as wills are required to be, yet at least one respectable court has held that since it is in the form of a deed it cannot be proved as a will.[9] In any event, the old man who so carefully set out to avoid the terrors and uncertainties of will-making, has succeeded in attempting to make a will without the slightest effort at complying with the requirements, which he probably knew something of and would have fulfilled had he only known what he was doing.

Such is the logical result where the grantor does reserve a right to recall the instrument in the case just put. The determination of the fact whether he did reserve any such right is a matter which depends upon conversations between the alleged escrowee and the grantor at the time of the delivery to him. At that time the grantor may have used phrases which are ambiguous beyond the hope of satisfactory interpretation. The person to

[9] Noble v. Fickes, 230 Ill. 594.

whom the deed was entrusted may not remember what was said, or he may honestly or corruptly state what was said inaccurately or falsely. After long and expensive litigation the whole question of fact may still be obscure and the final result depend upon nothing definite or satisfactory.

**§ 41. Delivery upon condition to grantee.** There is one technical and dogmatic rule regarding delivery upon condition which must be noted. The grantor cannot deliver upon condition to the grantee. If he does so the title passes in spite of the fact that the condition has not been performed.[10] There is a modern tendency, not yet very well defined, to protect the grantor against the grantee in such a case. But if the grantee has conveyed to a bona fide purchaser for value it is believed that the grantor must stand the loss.

## Section 6. Registration of Title.

**§ 42. The recording statutes.** There is some diversity in the provisions of the recording statutes in this country. Some provide that an unrecorded deed shall be ineffective against all the world, except the grantor and those who take from him with actual notice. This makes the unrecorded deed invalid against attaching, judgment, and execution creditors, and subsequent transferees who did not pay value, provided they had no actual notice. Other statutes provide that the unrecorded deed shall be void only against the subsequent purchaser for value without notice who records first. This makes the unrecorded deed good against judgment, execution and attaching creditors. Other acts combine the features of these two sorts of statutes, making an unrecorded deed void against judgment, execution and attaching creditors and purchasers for value who record first. A rather clumsy form of statute is one which only requires recording within, let us say, six months, and only fixes the character of the deed as an unrecorded deed if it has not been filed for record within the six months. Thus, if A receive a conveyance in January and records it in May, he can claim ahead of B, who purchased for value without notice and received a conveyance in February

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[10] Whyddon's Case. Cro. El. 520; Shep. Touch. 58, 59.

and recorded the same day. A rather extreme form of statute is one which makes the unrecorded deed void against the subsequent purchaser, whether he has notice of the previous unrecorded deed or not. The provisions of local statutes must be ascertained when the necessity arises.

**§ 43. Recording gives notice of what is recorded.** Whether our acts say so in terms or not, they are construed as providing that what is properly recorded is notice to all the world. Thus, if A agrees to sell land to B, and then A sells to C, who is a bona fide purchaser for value, in the absence of all recording, C will prevail over B. Now, if B records and the statute thereupon gives constructive notice of B's contract to all the world, C ceases to be in law a purchaser without notice. C is chargeable with notice of the contract, and B will prevail. Such, it is believed, is the universal attitude of our American courts toward the recording acts.

**§ 44. Errors of record.** Suppose A, owning lots 4, 5, and 6, conveys 4, 5 and 6 to X by deed. The recorder erroneously copies the deed so as to make it appear that lot 5 had not been conveyed, and thereafter A conveys lot 5 to Y, a bona fide purchaser for value. So far as the statute will permit it, Y ought to be protected. It is not usual or natural for a grantee to look at the record to see if his deed has been correctly recorded, yet it is possible for him to do so, while Y has absolutely no chance of doing so.

**§ 45. Doctrine of lis pendens.** There is a rule of the courts that when a suit in relation to land is started against a defendant, and service of summons is had upon him, the suit is constructive notice to all who may attempt to take title from that defendant. Thus suppose A conveys to B, and B obtains the conveyance by fraud. A sues B for a re-conveyance and obtains a decree in his favor. If, before any decree is rendered against B but after service of process upon him, B conveys to C, who takes without actual notice, C will nevertheless take subject to the decree afterwards entered against B and must convey to A. This is known as the application of the doctrine of lis pendens (pendency of suit). Such a rule was necessary in order that litigation might not be prolonged indefinitely by transfers pending the suit, and so that a suit might not in the end result in a futile decree.

**§ 46. Estoppel: Grantor and grantee indices.** Suppose that A, having no title, conveys to B. Then X, the true owner, conveys to A, and A conveys to C, a purchaser for value, without notice of any rights of B. Can B claim against C? If this case were not complicated with any question of recording the deed from A to B, or A to C, it would ordinarily be held that a legal title passed to B by way of estoppel immediately upon the acquisition by A of the title from X. Suppose, now, we inject into the above case the practical element of the recording acts. B records as soon as he receives his deed from A. A records as soon as he receives his deed from X, and C records as soon as he receives his deed from A. Now, can C claim against B? The final answer to this depends to some extent upon other considerations not yet mentioned.

If the indices to the records required by law are what are known as the grantor and grantee indices, and these are the only ones in use, much may be said in favor of C's prevailing over B. Such indices simply refer to all instruments filed by the names of the grantors and grantees. Under this system a reasonably careful conveyancer in tracing a title will commence with a certain grantee and run down the column of grantors in the grantor index till he finds the name of that person. He will then make a minute of that conveyance and then run down the grantee in that conveyance again in the grantor index, and so on until he has exhausted all the conveyances. By this process it is plain that the conveyancer will run down X's name in the grantor's index until he finds his deed to A, and then he will run down A's name in the grantor's index from the date he received the title until he comes to his conveyance to C. He will never find by this process the conveyance from A to B. To cover deeds made by a grantee before he received title the searcher would have to run down each grantee in the grantor's index practically from the date of his birth. That would be an extraordinary labor. It would be a labor out of all proportion to the benefit to be derived or the danger sought to be avoided, for such cases as the one put arise with the greatest infrequency. It is believed that reasonably careful conveyancers do not attempt to make any such search. Under these circumstances a ruling by courts that the deed from

A to B before A received his title, though recorded, really stands upon the footing of an unrecorded deed, since it is out of the regular chain of title, is welcomed by conveyancers and should be by the public at large. Courts have reached such a result.[1] They have, however, also reached the contrary result.[2]

**§ 47. Same: Tract indices, or both kinds.** Now suppose the indices required by law to be kept are what are known as tract indices, i. e., indices on which are noted on different pages the description of different parcels of property, and in the columns beneath a minute of all conveyances touching that property is noted. In that case the overlooking of the deed from A to B will be out of the question. The deed from A to B will appear in the chain of title plainly and easily. Under such circumstances the deed from A to B would be in the regular chain of title, and C, when he took his deed from A, would have constructive notice of B's interest from the records. The holding would then be in favor of B, provided always that B would prevail over C in the absence of all recording.

Suppose that the only indices in fact provided for by law were grantor and grantee indices, but that as a matter of fact tract indices were kept. It would be impossible to have in such a case more than one rule for a given jurisdiction. Unless, therefore, the practice of having tract indices were universal throughout the state, it is difficult to see how it would furnish the basis for any result other than that which permits C to prevail over B.

**§ 48. Purchaser without notice from purchaser with notice.** Suppose A, having title, conveys to B, and then to C. C records first, but has notice. Then B records. C then conveys to D, who is a purchaser without actual notice of the conveyance to B. B would have had priority over C. Will B then have priority over the grantee from C?

That will depend upon whether B's deed, though recorded, will stand as an unrecorded deed so far as D is concerned, because it is out of the regular chain of title. This again may depend upon the sort of indices which are legally required to be kept. If only the grantor and grantee indices are legally required and in

[1] Calder v. Chapman, 52 Pa. 359.
[2] White v. Patten, 24 Pick. 324.

use, it is apparent that in making a chain of title a conveyancer having found the deed from A to C will drop A and look for conveyances from C. A rule which required the subsequent purchaser from C to take notice of deeds from A recorded after the deed to C, would require a search of all deeds from A recorded after the deed from A to C, and until such time as C might convey to D. This again would place a burden on the searcher out of all proportion to the benefits to be gained or the danger sought to be avoided, because the situation presented in the case put must arise very rarely. It has been held that in the case put D must prevail over B,[3] and the contrary has also been held. When tract indices are required to be kept a different result might conceivably be reached because the above reasoning would not apply, and the recorded deed from A to B would fairly be in the chain of title.

### Section 7. Registration Under Torrens System.

**§ 49. The system of conveyancing produced by the recording acts.** The recording system inevitably produced the abstract of title business. It was natural that the evidence of title upon which transfers were based should be abstracts of records made by competent professional abstract makers of known integrity and care. As chains of title grew long and often more complicated it became necessary that lawyers skilled in the law of titles should give an opinion as to who had title, based upon what the abstract showed. In many places of late, both functions have been absorbed by corporations doing an abstract and title business. These have added to the business of conveyancing the feature of title insurance backed by a guaranty surplus. This does not mean that the title companies take any risks other than those which the more prudent conveyancers incur. It means simply that the opinion of conveyancing counsel and care in making up an abstract are backed with greater financial responsibility.

**§ 50. Defects of the system: Purchasers not completely protected.** There were some weaknesses in the system of convey-

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[3] Morse v. Curtis, 140 Mass. 112. Contra: Van Rensselaer v. Clark, 17 Wend. 25.

ancing built up upon the recording acts. In the first place the recording system did not protect purchasers against the fact that a deed in the chain of title was never delivered, or that the grantor was an infant, or that a grantor who was declared in the deed to be a spinster or a bachelor had a husband or a wife living who could claim curtesy or dower. It did not protect purchasers in the proofs of heirship which were made upon the death of the owner of land intestate. These difficulties, however, were not so great as seriously to interfere with the practical working of the system. General reliance upon the good faith of transfers was justified by the results, and it was very rare indeed that an innocent purchaser was ever deceived or suffered loss. Furthermore, with the advent of the guaranty system by corporations, possibility of financial loss as a result of these risks was reduced to a minimum.

**§ 51. Same: Increasing cost of transfers.** A more serious difficulty with the recording system was the increased cost of land transfers. The chain of title must be kept up by continuations of the abstract. In case of foreclosures, partitions, proceedings to quiet title, or the transfer of property by devise or intestacy, the number of pages of abstract for a transfer may run from twenty to fifty, at a cost of from fifty to one hundred dollars. In cases of the foreclosure of a mortgage dealing with a sub-division, where many different holdings have been sold to different persons and resold, the fees for the abstract have been known very materially to add to the price of each individual lot. In places where the records have been destroyed by fire and the abstract company has secured the only set of books of minutes of ante-fire records, they have been able to levy a heavy toll for ante-fire abstracts and proofs of title. Then as chains of title have grown long and more difficult, the examinations by competent counsel have become more expensive and upon each transfer a complete examination of the whole title had to be made from the beginning and paid for.

**§ 52. Benefits from title companies.** The advent of the guaranty companies did much toward ameliorating this useless waste. By well systematized records of former examinations, double examinations were avoided and each examination was made where

the last left off. The cost of making abstracts for the purpose of making examinations was reduced. Thus the title company has been able to provide itself with an abstract for examination, examine it, and issue a policy representing financial responsibility, at a less cost than the independent lawyer and abstract maker could do it. The consequence is that the independent abstract maker first, and latterly the independent lawyer-conveyancer, has largely been driven from this field of work, and the title guaranty company has made itself an established place in the conveyancing business.

**§ 53. Weaknesses of title guaranty system.** But the practice of the abstract company was not without a flaw. It still had to make abstracts, and the owner still had a right to file all sorts of papers, be engaged in all sorts of lawsuits, and die leaving a complicated will or an insolvent estate, between the date of one guaranty policy and another, so that an expensive abstract might still be necessary for a single transfer; and, upon examination by the company, title might be found to be so defective that further legal proceedings must be instituted to clear it up. Furthermore, the abstract and title guaranty business has tended in a given locality to become the monopoly of a certain corporation or corporations operating under mutual understandings, so that the complaint of excessive charges has been made. It has also been observed that, if the title company makes a fatal mistake, the land-owner will lose his land and have a recovery for money limited to the face of his policy, which is often allowed to remain at the figure at which land was purchased, far below the enhanced value of the land. The time which it takes to close a real estate transfer through the title company is considerable. The company has to make an abstract from the last continuation, and the title must then be examined and passed upon. Even in a simple case this takes several days. Then there is always a gap between the date of the opinion of title rendered by the company and the date of passing deeds and the purchase price. The purchaser is obliged to take the chance that the seller has not in the meantime made a conveyance to another or had a judgment rendered against him, or else go to the expense of an escrow arrangement by which the deeds and the purchase price are deposited

pending the recording of the deed and the further examination of the title.

**§ 54. Registration under the Torrens system: General aims.** To meet the difficulties enumerated above, South Australia in 1858 adopted legislation providing for a new system of registration of land titles. The initiative in this movement was taken by Sir Robert Torrens, from whom it gained the name, the "Torrens system." It was generally adopted in Australia, and in varying forms is now in use in several of the United States and to a limited extent in England.

The Torrens system aims to secure three important improvements in methods of dealing with land titles: First, that the state of the title shall be once determined conclusively for all time. Second, that the sufficiency and effect of each transfer thereafter shall be determined for all time at the time it is made. Third, that the whole state of the title shall be known at any one time by a simple reference to the appropriate record of the registrar's office.

**§ 55. Methods employed.** The first object is attained by a complete judicial hearing, with service of process upon and the publication of notice to all possible adverse interests, the taking of proofs of ownership, and the settling of all disputed questions of title by a decree directing registration. The registration of the title pursuant to the decree settles the title of the real estate, whether rightly or wrongly, and, when the time for review has gone by, the title so decreed is good so long as the decrees of the court are upheld by the government. There is no such thing as taking the applicant's title away from him and giving him damages too frequently inadequate.

The second object is attained by causing the title to be transferred only by the act of registration. The deed of the party no longer passes the title—it merely directs the registrar to transfer it and places upon him the legal duty to transfer it. Title passes only as and when the registrar transfers it on his books or records. Hence, the transfer as the registrar makes it is the one that counts. So it is with incumbrances, liens and mortgages. They do not exist as incumbrances till the registrar has noted

them upon his records. The registrar's certificate of title becomes the legal evidence of title, and not the act of the parties.

The third object is attained by a scientific method of bookkeeping. Each parcel of land registered has its own certificate, which is executed in duplicate. The owner has one. The other is kept on file in the office of the registrar. Whenever any lien or incumbrance is placed upon the property it is not effective until noted on the certificate. Hence, the exact state of the title is known at all times by reference to the certificate. When the title is transferred, the old certificate is cancelled and the new one made to the purchaser with such incumbrances appearing as are still liens, and the duplicate of that is again kept by the registrar.

**§ 56. Indemnity fund feature.** In the Torrens act as it came to us from Australia the power of the registrar in exercising a judicial discretion to determine who had title, and in whose name title should be registered, was very great. Under these circumstances the establishment of an indemnity fund, or governmental liability for the registrar's mistakes, was an essential and important feature of the act. In most of our American jurisdictions, however, a Torrens act in this original form, with such power in the registrar, would probably be held unconstitutional as vesting judicial power outside of the constitutionally established courts and depriving the landowner of his property without due process of law. Hence, our American Torrens acts necessarily include a complete judicial hearing, upon service of process, to all persons interested, before any registration is made. They may, indeed, go further and provide for a judicial hearing upon any acts of the registrar involving the exercise of any possible determination of the state of a title. The result is that the American Torrens registrar can hardly make a vital mistake as to a title which the court, on notice to all parties, has not been a party to, and inquiry into which is not precluded by an adjudication. The indemnity fund feature, or general governmental responsibility for mistakes in registration, while it exists in our American acts, is, it is believed, of much less practical importance than is usually supposed.

**§ 57. Advantages of Torrens system: Final settlement of**

validity of title. The original proceeding to register is in reality (except in contested cases) only the examination of the title in the usual way by means of an abstract or other evidences of title, and the entry of a decree upon the evidence presented. This proceeding, however, has advantages over an ordinary examination of title. It can terminate all objections to the title by means of a judicial decree, while examinations by conveyancers can only note the objections time after time, and conveyancing counsel can only give their opinion time after time that certain objections may be safely disregarded. In contested cases of registration under the Torrens acts, legal titles and questions of incumbrances can be finally settled.

§ 58. **Same: Protection to all interested parties.** Some prejudice has been excited against the system by raising the fear that by means of a Torrens registration a good title in A might be taken away from him and placed in B, and that A would have no recourse except against an indemnity fund. To this it may be replied that the same thing may happen in any court proceeding to quiet title. Thus, wherever anyone files a suit in court to establish title in himself, there is usually some important adverse interest which he is desirous of getting rid of. Suppose, for the sake of argument, that the plaintiff has no title whatever. He is obliged to make all persons having adverse interests parties. If they default and do not appear the plaintiff still is obliged to produce prima facie evidence of his own title. He does so and the court scrutinizes his evidence to the best of its ability, and, no objection being made by anybody, renders a decree in his favor. In such cases the true owner, who might have been able to establish his title beyond a shadow of doubt, may be entirely barred of his rights and without any recourse whatsoever. The same thing is true by a proceeding to establish title under the Torrens acts, but it is not peculiar to a proceeding under the Torrens acts. The result is one common to all proceedings to establish title. As a matter of fact, the danger of a bad title being registered is less under the Torrens acts than it is under a direct court proceeding to quiet or establish title. The Torrens examiners understand from the first that they have a public duty to perform, and that they are the protectors of the Torrens indemnity fund.

The result is that, from the time a petition for registration is filed, the claims and proofs of each applicant are as carefully scrutinized as in the case of a sale under the old system, where the seller submitted his abstract and proofs of title to the purchaser for examination. The Torrens examiners make a careful conveyancer's examination of the abstract of title, note all possible objections to the title, and require objections to be cleared up precisely as if no registration was to be made; and not until the objections are either waived, on grounds which a conveyancing counsel would certify as sound, or cleared up by proofs or additional deeds, will the Torrens examiners make a report to the court that a decree should be entered finding a clear title in the applicant. This represents an infinitely greater amount of care in the examination of proofs of title than is ever exercised in ordinary court proceedings where the defendants are in default and no contest is made. In such instances it is the common experience of lawyers in American jurisdictions that the court signs the decree which is handed him by counsel for the complainant, and does not pretend to go through the long and tedious process of examining proofs and evidence in support of the plaintiff's prima facie right. It cannot be too strongly insisted that under the Torrens acts there is no loophole by which an individual with no title can rush in and have himself registered as the holder of title to land which he does not in fact own.

§ 59. **Same: State of title always a matter of record.** Under the Torrens acts title is never allowed to get away from the hands of the public officer or his assistants. The exact and authoritative state of the title is known at all times by reason of the fact that it can be changed only through the medium and by the act of the registrar. Each step in the title is scrutinized by experts when it is taken and at the very time it is made, so that any mistakes of the parties can be considered at once. Such a thing as a misdescription can hardly occur. Strange and weird clauses in deeds, made by ignorant persons, are at once brought to their attention by experts in time to have a better instrument executed and substituted. Upon the death of an owner of registered land no new certificate issues until due proof of heirship has been made or the will is presented. If any difficulties of construction occur

in the will, they may be settled by a simple reference to the court which made the original registration for directions as to how the new certificate shall specify the interests.

§ 60. **Same: Facilitates rapid transfer of title.** The time required in which to close up transfers is of the briefest. The grantor makes a direction to the registrar to transfer the title to Jones and to hold the certificate till Jones pays the grantor the purchase price. The registrar makes the new certificate which shows title in Jones, and Jones makes his delivery of cash to the seller and obtains his certificate. The time necessary for the transaction can be reduced to a day.

§ 61. **Same: Reduces cost.** The fees for the original registration and subsequent transfers vary, of course, in different communities. In Chicago they compare very favorably with the current rates for guaranty policies. Thirty dollars covers the cost of a registration under the Torrens act. In a simple case of valid title, no lawyer is needed. The landowner places his abstract and evidences of title in the hands of the Torrens office. The abstract is brought down to date from the public records by expert abstractors of the office. The entire title is then examined by a competent examiner, who renders an opinion upon the title with all usual conveyancer's objections noted. This is then examined and approved by the Torrens examiner, who is a competent conveyancing counsel. If the title is then found to be without any material objections the Torrens office prepares the petition making the proper persons parties thereto, files this with the clerk of the court to which the cause is assigned, sees to the securing of proper service of process upon the defendants, and, when service is complete, secures a reference by the court to the Torrens examiner, who, as a judicial officer, drafts a report based upon the evidence of title submitted, and recommends a decree in accordance with the report. This is entered, the certificate of title is thereupon issued pursuant to the decree, and the landowner receives back his evidences of title.

Now suppose the landowner desires to obtain a guaranty policy at the current rates in Chicago. He will find that these vary with the amount of the policy and this, of course, is fixed according to the value of the land. For a policy of five hundred

dollars or less the rate is twenty dollars. The increase is two dollars per hundred after that until ten thousand is reached and it is three dollars per hundred for amounts over ten thousand. This, of course, means at least an equal initial cost to that of obtaining a Torrens certificate in all cases where the property is worth one thousand dollars. The current charges for bringing down an abstract are as follows: Certificate, five dollars; each ordinary instrument, one dollar and a half; each judgment or tax sale or special assessment shown, one dollar and a half; each written page of chancery or probate matter, one dollar and a half; each typewritten page of chancery or probate matter, three dollars. In many cases the cost of an additional abstract without any policy would equal the fees required to secure a Torrens certificate.

Now suppose one landowner has a Torrens certificate and another a guaranty policy. What are the respective charges necessary to have a new certificate or a new policy issued to the transferee? In the case of the guaranty policy the minimum current charge is six dollars and a half, but this charge may be much increased if the title has passed by will, or by foreclosure, or in any other way involving an unusually long proceeding since the first policy was issued. In such cases the price for issuing a new policy of the same amount may approach the thirty dollar mark. If the land has increased in value by placing improvements thereon or otherwise, and it is desired to increase the face of the policy, the cost will be five dollars per thousand of increase. On the other hand, each new certificate under the Torrens act costs three dollars, and it makes no difference how difficult or complicated the step in the title may be.

**§ 62. General Conclusion.** The Torrens system in theory is an improvement over any system of conveyancing yet put into practice. Under the guidance of an efficient registrar and an effective corps of assistants, there is no doubt that it can be made a practical success and an actual improvement over any system in force. In all jurisdictions where it has been tried it is probable that the act will need constant revision in details in the light of practical experience, in order that the best results may be obtained. Above all, the holding of office by an able registrar and the retention in their positions of able and efficient examiners

and assistants, is absolutely necessary. Finally, it may be said that there would be the greatest danger in the Torrens system being made compulsory for all lands inventoried in the estates of decedents—a plan which has been agitated in at least one American jurisdiction. Such a provision would, it is believed, swamp even a large and efficiently managed office. The natural growth will be fast enough, and in the process of its development an efficient corps of men will be educated and trained to enable the work to be satisfactorily carried on upon a large scale, and the Torrens act itself improved and perfected.

## Section 8. Transfer or Acquisition of Title Without Consent of Owner.

**§ 63. Forfeiture for crime.** At common law forfeitures of land to the state for crime were legal. In the case of treason the forfeiture was forever; in the case of lesser crimes, for a year and a day. By the Constitution of the United States forfeiture for treason is forbidden, except during the life of the person convicted.[1] In most states, by statute or constitutional provision, forfeiture for crime is abolished. In some, forfeiture for a limited time still exists.

**§ 64. Marriage: Curtesy and dower.** By the common law, when a man married a woman who was then the owner in fee of real estate, the husband immediately became entitled to an estate during the life of his wife in all of his wife's real estate. This was known as the husband's estate in the right of his wife. If a child was born of the marriage the husband secured upon his wife's death an additional estate by the curtesy, as it was called, during his own life. This also was in the whole of the wife's real estate. Upon the husband's death, leaving his wife surviving, she became entitled for her life to one-third of all the real estate owned by her husband at the time of her marriage or thereafter acquired by him, whether sold by him or not unless she had joined in the transfer. This was called dower. No birth of issue of the marriage was required as a condition precedent to the wife's right to dower. It is this possible right of curtesy or dower

[1] Const., Art. III, Sec. 5, § 2.

which makes it imperative in all cases for the wife or husband of one transferring title to land to join in the deed for the purpose of releasing the right of curtesy or dower.

§ 65. **Same: Statutory changes.** In some jurisdictions curtesy has been abolished and husband and wife alike have an estate of dower in one-third of the spouse's real estate which the spouse owned at the time of the marriage or thereafter acquired, and no birth of issue of the marriage is required. There is some tendency toward a legislative change by which one spouse obtains dower only in such land of the other as he or she dies actually the owner of. Such acts make it unnecessary for the wife or husband to join in the deed for the purpose of releasing dower. The legislative reasons in favor of such a reform are these: The cases where a married woman refuses to join in a deed of her husband's property in order to release dower, or where she asks for separate compensation for her right of dower upon a sale by her husband are very rare. There is no particular legislative policy in favor of the husband's right to dower in his wife's real estate, and the instances where he refuses to join in a deed by his wife, except for separate compensation paid to him, are likewise rare. Nevertheless, the danger that in a particular instance dower may not have been released by the joinder of a wife or husband is one of the principal reasons why an examination of title dating back for many years is required. When one considers how much examination and re-examination of titles may occur during a period of seventy-five or eighty years, when lands are sold and re-sold, all for the purpose of catching a possible outstanding dower or curtesy which is never found in nine hundred and ninety-nine cases out of a thousand, it is apparent that there is an economic waste which would be eliminated were the law to permit dower or curtesy only in such estates as the husband or wife actually owned at the time of his or her death. No practical injustice would result from such an act because of the extreme infrequency with which, as a matter of practice, a husband or wife has curtesy or dower in any lands other than those of which the husband or wife dies actually the owner of.

§ 66. **Same: Community property.** In several southwestern and far western states, including Louisiana, Texas, New Mexico,

Arizona, Idaho, Nevada, California, and Washington, property acquired by either husband or wife after marriage except that obtaind by gift, devise, or descent, is held as "community property" of the spouses. Generally, during the existence of the marriage, the husband has sole power to manage and convey this property, without even the necessity of the wife joining in the transfer (unless his conveyance is in fraud of her rights). Upon the death of either, the property generally, after payment of community debts, is divided equally between the survivor and the heirs or devises of the deceased spouse. In California, Nevada, and Idaho, the husband, as survivor, takes all the community property.

§ 67. **Attachment, judgment, and mechanics' liens.** These are the subjects of treatment by extensive statutory provisions in all jurisdictions. Rules of practice respecting them are to be ascertained principally by reference to the statutes of each particular state. Contractors, workmen, and material men are in many states given liens for a certain length of time upon the property upon which their services or material have been used in order to secure sums due to them therefor. A work of this scope cannot go into the details of these statutes.

### Section 9. Acquisition by Extinction of Owner's Title.

§ 68. **Tax sales.** Little general information can be given concerning the subject of tax titles. Its rules and regulations are fully dealt with in elaborate statutory provisions in every state. In some the tax title when acquired, is, at least after the period of redemption, a very dangerous adverse title which can only be upset with the greatest difficulty, if at all. In other jurisdictions it is well known that every tax deed can be upset by a good lawyer and a determined client who is prepared to pay the money necessary to fight the tax-buyer through to the highest court. In such jurisdictions the tax title is always noted as a serious objection to the title to the land, and some settlement with the tax-buyer, or a court proceeding to remove the tax deeds as clouds, is required before the title is regarded as merchantable.

§ 69. **Statutes of limitation.** The statutes of limitation in many states provide that actions for the recovery of real estate

must be brought within twenty years from the time the action first accrued. Others reduce the time to fifteen, ten, or even less. The precise time is a matter of great diversity in different jurisdictions. Many states have other special statutes which protect the possession of those who have color of title in good faith, and have been in possession and paid taxes for a specified number of years, for instance, seven. In addition it is sometimes provided that rights in land may be acquired by those who have had color of title in good faith and paid all the taxes on lands for a period of years, say seven, during all of which time said lands have remained vacant and unoccupied, and then have taken possession. The requirement that there must be color of title in good faith is satisfied by any deed, good in form, such as a tax deed. Color of title "in good faith" is self-explanatory.

**§ 70. Must adverse possessor have wrongful intent?** There was formerly an interesting division of judicial opinion in regard to whether a positive wrongful intent to deprive another was necessary to an adverse possession. This arose in regard to the common case where a neighbor built or placed his fence over the line by mistake, thinking he was within the true line of his own property. Clearly in such a case the person in possession, although by mistake, is actually trespassing and is liable for his trespass. Furthermore, he is claiming the land actually occupied over the line which does not belong to him as his own. If any one were to ask him where his line was and what actual physical space he was claiming as his own, he would point to the edge of his house or to the fence as it actually stood. He would be claiming up to the point to which his actual occupation ran in the lands even though his claim was founded upon a mistake. It is now clear to most courts that such possession by a neighbor occupying over the line, is an adverse possession.[2]

**§ 71. Interruption of adverse possession.** When the true owner finds that his land has been in the possession of another adversely, he has two courses open to him: (1) To bring suit for possession; or (2) to interrupt the continuity of the adverse possession by making an entry upon it. Whether an entry upon the adverse possession has been accomplished is a question of fact

[2] French v. Pearce. 8 Conn. 439.

No rule can be given for precisely what amounts to an entry. It is necessary that the true owner or his agent actually go upon the land physically and invade the possession of the one in adverse possession. Surveyors who find a line improperly run and a fence placed to the disadvantage of their clients sometimes begin slashing up the shrubbery and cutting small trees and undergrowth upon what they deem the land belonging to their client. The rational ground for such seeming vandalism is that their client's rights may be at once protected by the making of a distinct entry upon the possession of the neighbor in adverse possession. Such in fact is its operation. In one case the running of the twenty year statute of limitations was prevented by such action of a surveyor by a margin of only fifteen days.

### Section 10. Original Acquisition: Accretions.

**§ 72. Accretions defined.** Accretions are the imperceptible increase in land where it borders upon the sea, a lake, or a river.

**§ 73. Ownership of accretions: Unintentionally produced.** Where that part of the earth's surface which is covered with water is owned by the state, or by some person other than the owner of the land bordering upon the water, the question naturally arises, who becomes the owner of these accretions—the owner of the land covered with water, or the owner of the riparian property? It is now clear that, as between different private individuals, and as between the private individual and the state, the accretions belong to the riparian owner. The reason for this now given is one of public policy. The right of access for the riparian proprietor to the water is of great value to him. It is an essential part of the value of his land, whether for commercial purposes or mere esthetic enjoyment. The proprietorship of an infinitesimal width of imperceptible accretions which form upon the water's edge at a given time is of no practical value to the one who owns the title to the land under the water. To let him have the title to such accretions would be to begin the process of depriving the riparian owner of a great advantage, and confer no corresponding benefit on anybody else. Hence, the sensible rule that the accretions go to the riparian proprietor. There is perhaps still a slight question as to whether the accretions go to the

riparian owner when the actual boundary between the land and the water is marked with fixed monuments, or otherwise definitely known. But sound opinion seems to be against making any exception even in such a case.

**§ 74. Same: Intentionally produced by artificial means.** On the shore of a lake, where a great city and its suburbs have grown up and land has become very valuable, there is a great temptation on the part of the riparian proprietor to put out a breakwater for the ostensible purpose of protecting his beach, but in reality to build up a little more land by accretions. Let us suppose that the riparian proprietor's intent to cause the accretions by artificial structures jutting out into the lake is clear. Let us assume also, what would be the probable fact, that the state owns the bed of the lake. Can the state then sue the riparian proprietor in ejectment for the made land? This question is so difficult to answer that probably the safest rule to follow is not to buy any such made land without first obtaining the advice of a good lawyer.

Where land is made by artificial filling in, and the fee of the land covered by the water is in the state or in another individual, the made land belongs to the individual or the state owning the land beneath the water.

**§ 75. Division of accretions: Two rules.** So far as there are any mechanical rules on this subject, two may be singled out for mention. One rule is that each proprietor owns upon the new shore line in the same proportion that he owned upon the old shore line.[3] According to this rule the old shore line should be measured and the respective proportions of ownership of the riparian owners determined. Then the new shore line should be measured and the same proportions laid off upon it. Then lines should be drawn from the termination of the division lines upon the old shore line to the points upon the new shore line which represent its division.

The other rule is that you shall first find the middle thread of the stream as it exists after the accretions have been formed. Then extend the old boundary lines perpendicular to it.[4] In

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[3] Deerfield v. Arms, 17 Pick. (Mass.) 41.

[4] Miller v. Hepburn, 8 Bush. (Ky.) 326

favor of the latter rule it may be said that it takes account of the fact, in very many cases true, that the riparian proprietors own the bed of the stream to the center, while the former rule ignores that fact. In favor of the former rule, however, it may be said that it can be applied by the riparian proprietors themselves upon the bank of the stream, while the division of the accretions by the latter rule will require the expert services of a surveyor. Only a consideration of the condition of a particular community can determine whether the greatest good to the greatest number will follow from the adoption of the first or the second rule.

## CHAPTER VIII.

## REAL ESTATE MORTGAGES.

### Section 1. Nature and Essential Elements.

**§ 1. Definition.** A real estate mortgage is a lien or interest in land created by agreement between the parties, or by a transfer of such interest, for the purpose of securing the performance of an obligation. The party who makes the mortgage is the mortgagor and the one to whom it is made is the mortgagee. The early form of mortgage of land consisted of an absolute conveyance of the land by the owner or mortgagor to the mortgagee subject to a condition, or defeasance, as it was called. This condition or defeasance provided that, on the payment of the debt or performance of the obligation which the mortgage was given to secure at a certain date, by the mortgagor, he could re-enter on the land and have full ownership again. The mortgagee got an absolute right to the land, and could take possession and collect the rents and profits. Subsequently, courts of equity began to give the mortgagor relief from the injustice of the common law and began to allow the mortgagor to redeem his land after he had made default. About the time of Charles I (1625-49) it became a well settled doctrine that a mortgagor could redeem his property after default by paying the money which was actually due. This right of the mortgagor was called his "equity of redemption." When this right of redemption was first allowed there was no limit to the time within which the redemption might be made, so that a mortgagee could never get the property free from a possibility of redemption, and, if the land years after the default became very valuable, naturally the mortgagor would try to redeem it. In order to obviate this difficulty equity allowed the mortgagee to bring a bill to foreclose the mortgage and cut

off the right of redemption. In such a proceeding a decree would be entered requiring the mortgagor to exercise his right to redeem by a certain day, fixed in the decree, or his right would be cut off forever. On his failure to redeem at the time fixed, the property became the absolute property of the mortgagee.

**§ 2. Legal and equitable theories of mortgages. "Title theory." "Lien theory."** As explained above, courts of law and courts of equity had different views as to mortgages—the former regarding the mortgagee as the owner, subject to the right of the mortgagor to perform his condition and re-enter; the latter regarding the mortgagee as having only a lien on the land as security. In England and many of our states the law courts still hold to the old legal theory and regard the title and right of possession as passing to the mortgagee, though the strict legal doctrine has become much modified. For convenience, this theory is called the "title theory" of mortgages, since the title passes to the mortgagee. In these "title theory" jurisdictions are courts of equity which enforce the equitable theory of mortgages, so that, while the law courts will give the mortgagee the right to take possession of the property at any time, the mortgagor can go into a court of equity and force the mortgagee to account for any income from the property he gets while in possession. This equitable accounting is enforced so strictly that there is little or no advantage to the mortgagee in taking the possession from the mortgagor, even though he has the right to do so. But even in the law courts of "title theory" states the mortgagor today is regarded as the real owner as to everyone except the owner of the mortgage.[1]

In the majority of our states the law courts have adopted the equitable theory of mortgages, and in these states the title remains in the mortgagor, who is the owner of the property, and the mortgagee has only a lien on it. This view, for convenience, is called the "lien theory" of mortgage. In the "title theory" states the law is tending towards the "lien theory," and prob-

[1] The states in which this view prevails are Alabama, Arkansas, Connecticut, Illinois, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, North Carolina, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, West Virginia and Ohio.

ably in the future the old legal theory of mortgages will disappear entirely.[2]

§ 3. **What property can be mortgaged?** In general any interest in land which can be sold, granted, or assigned, may be mortgaged. Equitable as well as legal interests may be mortgaged. Some of the common interests subject to mortgage are fee simple estates, estates for life, estates for years or leaseholds, dower interests of a widow or the curtesy of a husband, a mortgagee's interest, and a mortgagor's interest. Land may be mortgaged separately from the improvements, or the improvement separately from the land. A landowner may mortgage crops growing on the land. It is needless to enumerate all of the various interests that may be mortgaged.

§ 4. **Same: Future acquisitions.** Property which one does not own, but expects to acquire in the future, is not subject to present sale and hence cannot be mortgaged. But if an attempt is made to mortgage property to be acquired, and such property is acquired subsequently, while there is no legal mortgage, equity creates a lien as soon as the property is acquired, which is good as to all persons who subsequently acquire rights in the property and are not bona fide purchasers for value without notice. The rule that a legal mortgage cannot be made of property to be acquired in the future has an apparent exception. When there is a mortgage on real estate, and a building or other improvement is attached to the land, the mortgage covers such a building or improvement. This is because when the building is attached to the land it becomes a part of it and consequently is covered by the mortgage, which is on all the land. A mortgagee of real estate gets a legal interest in it and is a purchaser within the recording acts. If he takes his mortgage for value and puts it on record, he gets a prior right as to all unrecorded deeds of which he had no notice.

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[2] The states in which this view prevails are California, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nebraska, Nevada, New York, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Wisconsin, Utah and Washington.

In Delaware, Mississippi and Missouri there is a combination of the two theories. Before default the mortgagee has only a lien, after default he has the legal title.

§ 5. **Forms of mortgage: Ordinary form.** The common form of mortgage which is still much used in "title theory" states is a deed which conveys property to the mortgagee, subject to a condition. It is an instrument which must be in writing and executed with all the formalities of a deed conveying land, for this is what it purports to be. In "lien theory" states short forms of mortgages are usually authorized by statute, and a mortgage is usually not such a formal, technical instrument as in "title" states. Mortgages are, in all states, required to be recorded if the mortgagee desires to be protected against subsequent purchasers of the land for value without notice of the mortgage. When recorded, the record of the mortgage is constructive notice of the mortgagee's rights as to all subsequent purchasers.

A form of mortgage may be as follows:

REAL ESTATE MORTGAGE.

THIS INDENTURE WITNESSETH, that the mortgagors, *John Henderson and Kate Henderson, his wife,* of the *City of Chicago* in the County of *Cook* and State of *Illinois*, Mortgage and Warrant to *William Smith* of the *City of Chicago*, County of *Cook* and State of *Illinois* to secure the payment of *a* certain promissory note , executed by *them*, bearing even date herewith, payable to the order of *William Smith, for One Thousand Dollars ($1,000) two years after the date hereof, with interest at five per cent (5%) per annum, payable semi-annually and evidenced by four interest notes or coupons, of even date herewith, each for the sum of Twenty-five Dollars ($25.00) and payable respectively six months, twelve months, eighteen months, and twenty-four months after date,* the following described Real Estate, to wit: *Lot two (2) in Block twenty-one (21) in Charles H. Watkins' Subdivision of the City of Chicago, Section twenty-eight (28), Township thirty-nine (39), Range fourteen (14) east of the Third Principal Meridian,* situated in the County of *Cook* in the State of Illinois, hereby releasing and waiving all rights under and by virtue of the Homestead Exemption Laws of this State.

Dated this *ninth* day of *October,* A. D., *1937.*

*(Signed) John Henderson.* [SEAL]

*(Signed) Kate Henderson, his wife.* [SEAL]

MUST BE ACKNOWLEDGED. FOR FORM OF ACKNOWLEDGMENT, SEE P. 248.

**§ 6. Same: Sale with right to repurchase.** A land owner may sell his land and have an agreement that he is to have the right to repurchase it for a certain price within a certain time. Such a sale on condition is not invalid. But advantage may be taken of this by a person with money to loan, and such a conditional sale may be made when the real purpose is to secure a debt. In this way the one who loans the money can in effect avoid the right to redeem which is a part of every mortgage. Courts of equity, in pursuit of the policy of preventing oppression of the mortgagor, allow extrinsic evidence to be admitted to show whether the transaction is what it purports to be, or whether it was intended to secure a debt. If the latter, it is declared to be a mortgage. The presumption in such a case is that a conditional sale is a mortgage, and the vendor must show by clear evidence that it was really intended as a sale with right to repurchase. In determining whether a transaction is a conditional sale or a mortgage, the fact that there was an indebtedness existing or created at the time of the conveyance is almost conclusive in favor of a mortgage, as is also the fact that the grantor remained in possession of the property, while the fact that a reasonable price was paid for the land indicates a conditional sale.

In an illustrative case, a man conveyed his farm, worth $15,000, by absolute deed, for a consideration of $5,000. A separate informal instrument gave him the right to repurchase the farm within four months from date, on payment of $5,000. He did not repurchase. Later he brought a bill in equity to redeem and introduced testimony to show that the transaction, a conditional sale in form, was really a mortgage. The court held that the transaction was clearly shown by the evidence introduced to be a mortgage, and decreed that the grantor be allowed to redeem. It said that the court would look behind the forms with which the contrivance of the buyer had enveloped the transaction.[2] This case shows that a conditional sale may be shown to be a mortgage. It also shows that the defeasance may be informal in equity, for the separate writing here was not a formal deed.

[2] Russell v. Southard, 12 Howard, 139.

**§ 7. Same: Deed of trust.** Trust deeds are often used in the place of ordinary mortgages for the purpose of securing debts. The property is conveyed to a trustee to hold in trust, and, if the payment is made, the trustee is to reconvey to the grantor. If there is default in payment, the trustee sells the property and applies the proceeds to the payment of the debt secured. Thus in effect there is a mortgage. Such an instrument is particularly convenient where the debt is owned by a large number of persons. When it is desired to issue bonds secured by a mortgage on a railroad, for instance, a trust deed may be made to secure the whole issue. The bonds are then sold to whomsoever wishes to buy. If default is made, the trustee can sell the road and pay the various bond-holders. It would be impracticable in such cases to give each bondholder a separate mortgage.

A form of trust deed appears on the opposite page.

**§ 7a. Same: Absolute conveyance.** If an absolute deed is made to a person to secure a debt, if it can be shown by parol or extrinsic evidence what the real nature of the transaction is, equity will declare it a mortgage. This is allowed in spite of a rule of evidence that a written instrument cannot be varied by evidence outside of the writing itself—that is, by extrinsic evidence. (See Chapter I, § 76.) But before an absolute deed will be declared a mortgage, equity requires the mortgagor to show by clear and convincing evidence that it was really so intended. Thus, in a Pennsylvania case, the plaintiff in a bill to redeem had made a conveyance to the defendant. Twenty years later, a bill to redeem was brought, the plaintiff claiming that the defendant had in fact agreed orally to reconvey, as soon as he was paid back the money due, and that the transaction was really a mortgage and not an absolute conveyance. The court held that here the plaintiff's claim was not sustained by such clear, precise and indubitable evidence as to induce equity to declare an absolute deed a mortgage, and hence the deed would not be declared a mortgage.[3]

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[3] Wallace v. Smith, 155 Pa. State 78.

TRUST DEED.

THIS INDENTURE WITNESSETH, That the grantors, *John Henderson and Kate Henderson, his wife*, of the *City of Chicago* in the County of *Cook* and State of *Illinois*, for and in consideration of the sum of *One Thousand* Dollars in hand paid, CONVEY and WARRANT to *John Jones* of the *City of Chicago*, County of *Cook* and State of *Illinois* the following described real estate, to-wit: *Lot (2), in Block twenty-one (21) in Charles H. Watkins' Subdivision of the City of Chicago, section twenty-eight (28), Township thirty-nine (39), Range fourteen (14), east of the Third Principal Meridian* situated in the *City of Chicago*, County of *Cook*, and State of *Illinois* hereby releasing and waiving all rights under and by virtue of the Homestead Exemption Laws of the State of *Illinois* and all right to retain possession of said premises after any default in payment or a breach of any of the covenants or agreements herein contained; in trust nevertheless, for the following purposes:

WHEREAS, The said *John Henderson and Kate Henderson, his wife* Grantors herein *are* justly indebted upon *a principal* Promissory Note , bearing even date herewith, payable to the order of *William Smith, for One Thousand Dollars ($1,000.00), Two years after the date hereof, with interest at five per cent (5%) per annum, payable semi-annually, and evidenced by four interest notes or coupons, of even date herewith, each for the sum of twenty-five Dollars ($25.00) and payable respectively, six months, twelve months, eighteen months, and twenty-four months after date.*

Now, If default be made in the payment of the said *principal* Promissory Note , or of any part thereof, or the interest thereon, or any part thereof at the time and in the manner above specified for the payment thereof, or in case of waste, or non-payment of taxes or assessments on said premises, or of a breach of any of the covenants or agreements herein contained, then in such case the whole of said principal sum and interest, secured by the said *principal* Promissory Note, shall thereupon, at the option of the legal holder or holders thereof, become immediately due and payable; and on the application of the legal holder of said Promissory Note , or either of them, it shall be lawful for the said grantee, or his successor in trust, to enter into and upon and take possession of the premises hereby

granted, or any part thereof, and to collect and receive all rents, issues and profits thereof; and, in his own name or otherwise, to file a bill or bills in any court having jurisdiction thereof against the said party of the first part, *their* heirs, executors, administrators and assigns, to obtain a decree for the sale and conveyance of the whole or any part of said premises for the purposes herein specified, by said party of the second part, as such trustee or as special commissioner, or otherwise, under order of court, and out of the proceeds of any such sale to first pay the costs of such suit, all costs of advertising, sale and conveyance, including the reasonable fees and commissions of said party of the second part, or person who may be appointed to execute the trust, and *one hundred* Dollars attorney's and solicitor's fees, and also all other expenses of this trust, including all moneys advanced for insurance, taxes and other liens or assessments, with interest thereon at seven per cent per annum, then to pay the principal of said note , whether due and payable by the terms thereof or the option of the legal holder thereof, and interest due on said note up to the time of such sale, rendering the overplus if any, unto the said party of the first part, *their* legal representatives or assigns, on reasonable request, and to pay any rents that may be collected after such sale and before the time of redemption expires, to the purchaser or purchasers of said premises at such sale or sales, and it shall not be the duty of the purchaser to see to the application of the purchase money.

And It is further provided and agreed, that upon the filing of any bill of complaint in any court having jurisdiction thereof, to foreclose this Trust Deed, such court may at once upon application therefor, appoint *the Chicago Title & Trust Company* or any suitable person, receiver, with power to receive and collect the rents, issues and profits arising out of the said premises, and apply the same toward the payment of the expenses and costs in such proceeding, and any remainder upon said indebtedness; and that said Receiver shall have the full power of receivers, and such other power in the premises as to said Court shall seem proper.

AND Said first party hereby agree, that *they* will, in due season, pay all taxes and assessments on said premises, and will keep all buildings that may at any time be on said premises, during the continuance of said indebtedness, insured in such company or companies and for an amount (not exceeding the amount of said indebtedness), as said second party, or the holder of said note may from time to time direct, and will properly assign such policy or policies of insurance to said party of the second part as further security for the indebtedness aforesaid. And in case of the refusal or neglect of said party of the first part thus to insure, or assign the policies of insurance, or to pay taxes as aforesaid, said party of the second part or his successor in trust, or the holder of said note , may procure such insurance, or pay such taxes; and all moneys thus paid, with interest thereon at seven per cent per annum, shall be and become so much additional indebtedness, secured to be paid by this Trust Deed.

WHEN The said note and all expenses accruing under this Trust Deed shall be fully paid, the said grantee or his successor or legal representatives shall re-convey all of said premises remaining unsold to the said grantors or *their* heirs or assigns, upon receiving his reasonable charges therefor. In case of the death, resignation, removal from said *Cook* County, or other inability to act of said grantee *John Jones* then *Henry Watkins* of said *County* is hereby appointed and made successor in trust herein, with like power and authority, as is hereby vested in said grantee. It is agreed that said grantors shall pay all costs and attorney's fees incurred or paid by said grantee or the holder or holders of said note in any suit in which either of them may be plaintiff or defendant, by reason of being a party to this Trust Deed, or a holder of said note , and that the same shall be a lien on said premises, and may be included in any decree ordering the sale of said premises and taken out of the proceeds of any sale thereof.

WITNESS, The hands and seals of the said grantors, this *ninth* day of *October*, A. D., *1937*.

*John Henderson.* [SEAL]
*Kate Henderson, his wife.* [SEAL]

MUST BE ACKNOWLEDGED. SEE FORM ON P. 248.

**§ 8. The obligation. Description of debt.** The debt secured is usually in the form of a note or bond separate from the mortgage. The debt should be carefully described in the mortgage, in order to make it valid as against subsequent purchasers and creditors, but it is enough if sufficient is stated so that the

amount of the debt can be ascertained. It is sufficient if a general description is given.

§ 9. **Same: Future advances.** A mortgage, which by its terms states it is to secure a definite debt, cannot be extended by an agreement between the parties to cover money subsequently advanced, so as to make it a valid lien for such advances as to third persons, though such an extension is good between the parties to the mortgage. But when a mortgage states that it is to secure future advances, it is valid even as against subsequent purchasers and creditors, and, by the weight of authority, it need only state that future advances are secured without stating the amount to be advanced.[3a] Under such a mortgage the mortgagee has a prior lien for all advances he makes without knowledge of rights under subsequent mortgages or liens, but not as to subsequent mortgages or liens of which he has notice. However, he does not have to make any attempt to discover such mortgages and liens, even though they are recorded. But if such subsequent liens are recorded, some states hold that each advance is in effect a separate mortgage, and the records are constructive notice to him, the prior mortgagee,[4] while others hold he is not charged with notice by the records.[5]

§ 10. **Personal liability of mortgagor.** The mortgagor is usually personally liable for the mortgage debt, not because he makes a mortgage, but because he made some note, bond, covenant, or other contract by which he agreed to pay the debt. The mortgage is held valid in most states, though there is no debt which can be enforced personally against the mortgagor, as where the debt is barred by the statute of limitations. A mortgage may also be made to secure the performance of obligations other than debts.

§ 11. **Effect of illegal purpose.** The courts try to deal with illegality in the way they think will tend to discourage it. Therefore, when a mortgage is given for an illegal purpose, if both parties are considered equally culpable, or in pari delicto, as it is called, the law leaves them where it finds them—it refuses

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[3a] Allen v. Lathrop, 46 Ga. 133.

[4] Spades v. Lawler, 17 Ohio 371.

[5] Frye v. Bank of Illinois, 11 Ill. 367.

to give aid to either party. Accordingly, the courts have refused to enforce a mortgage given to obtain the suppression of a criminal prosecution,[6] or to secure a gambling debt,[7] or a debt for liquor illegally sold.[8] When the mortgagor is not considered in pari delicto, the courts will aid him if he applies to them, but if he comes into a court of equity asking aid, equity requires him to pay whatever sums he justly owes, for "he that comes into equity must do equity." Cases of this sort often arise under usury statutes. Where the mortgage provides for a rate of interest which is above the legal rate, the mortgagor, being regarded as having been forced into the agreement by his necessity, is not in pari delicto with the mortgagee in the eyes of the law. If he comes into a court of equity for relief, however, he must in most states pay the principal and legal interest due, and only the usurious interest is forfeited.

## Section 2. Rights and Liabilities Incident to Mortgage Relation.

**§ 12. Mortgagor's interest.** The mortgagor, even in "title theory" states, is regarded as the owner of the land. He has the same right to control the property as before making the mortgage, except as against the mortgagee. He may sell the land, or lease it, or make any number of subsequent mortgages. When he dies his interest passes as real estate to his heirs, if he leaves no will, and his widow gets dower rights in it. His interest may be sold by a judgment creditor under execution, but in most states the mortgagee himself cannot get a judgment for the mortgage debt against the mortgagor and levy on the mortgaged property, though he can levy on any other property belonging to the mortgagor.

**§ 13. Mortgagee's interest.** In "title theory" states the mortgagee has the legal title and right of possession of the mortgaged property, but can exercise the rights of an owner only when desirable to protect his security. In order to protect his security he can bring actions at law against the mortgagor or

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[6] Atwood v. Fisk, 101 Mass. 363.
[7] Barnard v. Backhaus, 52 Wis. 593.
[8] Baker v. Collins, 9 Allen 253.

third persons, as if he were the owner of the property. He may eject the mortgagor or any trespasser on the land, or may sue anyone who wrongfully removes timber or fixtures from the property, or commits waste thereon. In "lien theory" states the interest of the mortgagee is, as was stated before, a mere lien on the land, and he is in no sense the owner and has no rights of ownership.

**§ 14. Right to possession of mortgaged property.** In "title theory" states the mortgagee is entitled to possession of the property, and can eject the mortgagor and take possession at any time, unless there is an agreement that the mortgagor is to retain possession. That the mortgagor is to have possession may also be implied from the terms of the mortgage, as when the mortgage provides that the mortgagor is to cultivate the land. As a a rule, the mortgagee does not exercise his right to possession, because if he takes possession he is required to account for all the rents and profits he receives from the land; and equity holds him so strictly in such an accounting that there is nothing to be gained by taking possession of the property. In states where the "lien theory" of mortgages prevails the mortgagee is not entitled to possession; but in some of these states it is held that if he gets possession of the property after default by the mortgagor, he can retain possession till the land is redeemed. Aside from this, in "lien theory" states the mortgagor is entitled to possession till judicial sale on foreclosure.

**§ 15. Rents and profits: Mortgagor in possession.** While the mortgagor is in possession of the property he is entitled to all the rents and profits from the land. In a "lien theory" state this is clear. In a "title theory" state he is in the position of a tenant at will, for his possession can be taken away by the mortgagee, but he is a tenant so long as allowed to remain. In a case decided by the United States Supreme Court, the mortgagee brought suit against the mortgagor to recover rents and profits which the latter had collected while holding the mortgaged land. The Supreme Court held that, as mortgagee, he was not entitled to the rents and profits of the land until he took actual possession. He may get possession by ejectment, or, if there are tenants on the land, he may give them notice to pay the rent to

him; but, if he suffers the mortgagor to retain possession personally, or to collect rents from the tenants, he cannot recover the rents and profits which the mortgagor has actually received. A mortgagor in possession is liable for interest on the debt, and not for rents and profits.[9] This case is law, even when the mortgaged property is not adequate security for the debt; but in such a case the mortgagee can have a receiver appointed to take charge of the property and collect the rents and profits for the benefit of the mortgagee.

§ 16. **Same: Mortgagee in possession.** If the mortgagee takes possession he can collect the rents and profits, but if the mortgagor redeems, such rents and profits must be accounted for. However, the mortgagee can keep all the income he gets from the property until an accounting is required of him. Such an accounting may be required if the mortgagor redeems the property, or if the mortgagee forecloses his mortgage. On accounting any income the mortgagee has received from the land is applied to the payment of the mortgage debt. The mortgagee is required to account for all he got from the land, whether much or little. If he does not get as much for the land as a man by reasonable care and diligence should have gotten, he must account for what he ought to have gotten. To illustrate, a mortgagee took possession of a farm and allowed the house to remain vacant and the land untilled part of the time. He also cut a lot of timber and sold it. The mortgagor redeemed the land, and in accounting the court required the mortgagee to pay over what he ought to have gotten as rent for the premises, and also to account for the money he received for the timber he sold from the land. The court said it would not do for a mortgagee in possession to fold his arms and use no means to procure a tenant. At least, if the house was not rented, he ought to have the land properly tilled.[10] The above case shows pretty clearly why it is of no advantage to a mortgagee to take possession of the property, for, if he does so, he will have to account some day, and may be held liable for more than the income he actually got out of the land.

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[9] Teal v. Walker, 111 U. S. 242.

[10] Schaeffer v. Chambers, 6 New Jersey Equity 548.

**§ 17. Effect of lease of mortgaged land: Before the mortgage.** When a lease of the land is made before it is mortgaged, the lessee gets a good lease, for he got his lease at a time when his lessor had full right and title to the land. The mortgagee takes subject to such lease and cannot take the possession from the lessee. He can, however, serve the lessee with notice that he, as mortgagee, has title to the property and that rents must be paid to him. Thereupon, the tenant, if he holds his lease, must pay to the mortgagee all rents which have accrued since the mortgage was executed and are still unpaid, and rents which accrue in the future.

**§ 18. Same: After the Mortgage.** After the mortgage is made, the mortgagor cannot make a lease which will in any way affect the rights of the mortgagee. The lessee must take subject to any existing mortgage. In "title theory" states, the mortgagor being only a tenant at will, the lessee who takes his lease after the mortgage cannot get any better right than the mortgagor has; consequently the mortgagee can eject him and put an end to the lease, or he can demand rent of the lessee; and the lessee must recognize him as landlord if he wishes to remain on the property. If the lessee recognizes the mortgagee as his landlord and pays rent to him, what is in effect a new tenancy is created, the tenant thereafter holding under the mortgagee.

**§ 19. Mortgagee's expenditures to protect property: Taxes and incumbrances.** A mortgagee can pay off or redeem from a superior incumbrance in order to protect his security, and can charge the amount so paid up to the mortgagor. In the same way he may pay taxes or special assessments which are a lien on the land, or defend suits which threaten the title of the mortgagor, and recover sums so expended. In general, he may make any reasonable expenditures which are necessary to protect the title to the property. If not allowed to do this, his security might be sold and thus lost to him. The mortgagor should make all such expenditures, and if he does not, the mortgagee is allowed to make them for him.

**§ 20. Same: Repairs and improvements.** A mortgagee in possession may make all necessary repairs, and, on foreclosure or redemption, charge them against the mortgagor. He may

make such improvements as are necessary for the proper enjoyment of the premises, and recover their value, but cannot recover for improvements which are desirable, but not necessary. Thus, a mortgagee in possession repaired the house on certain mortgaged premises, and paid for insurance on the buildings. He also built some new fences and a new house. The mortgagor redeemed the property, and, in the accounting between the parties, the court held the mortgagee should have credit for the repairs to the old house, for the new fences he put up, which were badly needed, and for the insurance premium he had paid. All these were held necessary and proper expenses. But he was not allowed credit for the new house, because that was not a necessary improvement.[11] The reason why the mortgagee is not allowed for any improvements except what are necessary is that if he could recover for all improvements he would often prevent redemption. Suppose, for instance, that the mortgagor was poor, and the improvements put on the property amounted to more than the value of the land when mortgaged. The mortgagor would not be able to raise the money necessary to redeem from the mortgagee in many cases, for, when he goes into equity to redeem, he has to pay the sum due in cash. There is one exception to the above rule as to improvements. When a mortgagee takes possession and makes improvements innocently, thinking that he is owner of the land, as where he purchased at a judicial sale which was later declared void on an appeal to a higher court, he is allowed credit from the mortgagor, in case of redemption, to the extent of the increased value of the land due to such improvements.

§ 21. **Insurance by mortgagor and mortgagee.** The mortgagor, being regarded as owner of the mortgaged property, has an insurable interest in the property, and can insure it for full value, regardless of the amount for which it is mortgaged. By the terms of the mortgage he is often required to insure for the benefit of the mortgagee, and if he fails to keep up the insurance, the mortgagee can insure and charge the cost up against him. This insurable interest of the mortgagor continues until his right to redeem is barred. The mortgagee has an insurable interest in

[11] McCumber v. Gilman, 15 Ill. 381.

the property, which continues until the mortgage is extinguished. When he insures for the benefit of, or at the expense of, the mortgagor, in case of loss the proceeds of the insurance must be applied to the reduction of the mortgage debt. When he insures for his own benefit and at his own expense, if he collects insurance money it belongs to him and the mortgagor has no right to any benefit from it. But the insurance company which paid the money is entitled to be subrogated to the mortgagee's right against the mortgagor to the extent of the insurance it paid, so that the mortgagee is not really entitled to collect and keep both the insurance money from the company and the mortgage debt from the mortgagor.[12] The interests of both the mortgagee and of the mortgagor may be insured at the same time.

**§ 22. Remedies of mortgagee for injury to property.** The owner of land subject to a mortgage has a right to a reasonable use of the land for the purposes for which such land is ordinarily used. He may improve it, cut timber from it, or do any act which can fairly be regarded as done in the exercise of good husbandry. His rights are similar to those of an ordinary tenant, though perhaps somewhat greater. He is not allowed to do acts on the land which will substantially impair its value as security for the mortgage debt. Thus, he may not cut large amounts of timber, or tear down the buildings, or cut shade trees and the like, if the acts tend to lessen the safety of the security. The mortgagee can restrain such acts by injunction. If the damage is already done, and the timber or lumber already severed from the land, he can, in "title theory" states, replevy the property wrongfully severed, sue the mortgagor in trespass, or sue him for its conversion. The reason he has these actions is that the title to the land is in the mortgagee, and, as soon as a tree is cut, though it becomes a chattel, the title of this chattel is in the mortgagee, so he can sue anyone wrongfully removing it or who wrongfully obtains it. In the "lien theory" states these actions will not lie, for the thing when severed belongs to the mortgagor—he has the title to it. In such states the mortgagee can enjoin anyone who is committing waste, and can sue

[12] Norwich Fire Ins. Co. v. Boomer, 52 Ill. 442.

the party who wrongfully severs an article for doing the wrongful act.

The mortgagor is not liable for depreciation in the value of the land due to the ravages of time. The mortgagee in possession owes a duty not to commit waste, and can be restrained by injunction from doing so, and must account for any loss due to injury to the premises by him. He is bound to make certain necessary repairs, but is not liable for failure to repair unless he has been grossly negligent in this respect.

### Section 3. Transfer of Mortgaged Property.

**§ 23. Effect of transfer in general.** The mortgagor can give, sell, or will the mortgaged property, and if he dies intestate it passes to his heirs if he has a freehold interest, and to his personal representative if he has less than a freehold. Any person who derives his right to the property through the mortgagor, as an assignee or an heir, stands in the same position as the mortgagor and may have the same but no greater rights than the mortgagor had. A transferee of the mortgagor's interest may redeem the land, and may require a mortgagee in possession to account for rents and profits, or he may enforce any other rights which the mortgagor had.

**§ 24. Liability of transferee.** One who takes a conveyance of mortgaged property is not personally liable for the mortgage debt because of the conveyance. The land is liable, not the transferee. He is not personally liable unless he agrees expressly or impliedly that he will assume or pay the mortgage debt. His agreement to assume the debt may be implied, however, from the terms of the transfer of the land to him. For instance, when it appears that a certain sum, say $5,000, was to be paid for land subject to a $3,000 mortgage, and the transferee paid $2,000 and took a conveyance of the land subject to the mortgage, it has been held that there was an implied agreement by the transferee that he would assume the mortgage debt.[13] The transferee is personally liable directly to the mortgagee, where he assumes the mortgage debt.

[13] Townsend v. Ward, 27 Conn. 610.

**§ 25. Liability of mortgagor after transfer.** When the transferee of mortgaged land assumes the debt, he becomes the person who is primarily liable to pay it, as between him and the mortgagor, for he has promised the mortgagor he will pay it. The mortgagor then becomes a surety for the payment of the debt, and the transferee is the principal. This has no effect on the right of the mortgagee against the mortgagor personally, unless he in some way consents to hold the mortgagor as a mere surety. After such a transfer the mortgagee is in many states bound to recognize the relation of principal and surety, and if he extends time of payment to the principal, here the transferee, the mortgagor is thereby released from liability. Thus, where the mortgagor had conveyed the land to another person, and this one in turn to a second party, each party in turn assuming the debt, the supreme court of Illinois said that each subsequent purchaser became an original promisor for the payment of the mortgage debt, and the original mortgagor became a surety for its payment to the creditors.[14]

**§ 26. Transfer of part of property only.** Several portions of the mortgaged property may be conveyed, by similar conveyances made at the same time, to a number of different persons, none of whom assumes the mortgage debt. In such a case each portion of the land so conveyed is security for its proportional share of the entire debt. But the mortgagee can foreclose and sell any part he pleases, and may proceed to enforce his lien against one part. If the owner of this part, to save his land, pays the entire debt, he can force the owners of the other portions to pay their proportion based on the value that the portion each man owns bears to the value of the whole property. If then, the party who paid the debt held one-fourth of the land, he would recover three-fourths of the amount he paid from the other owners. If the mortgagor of land transfers several portions to parties who do not assume the debt, and retains part of the land himself, clearly the part he holds ought to be liable for the whole debt, for, after all, the mortgagor is the person who owes the debt and he ought to pay it. Accordingly, in equity, while the mortgagee has the right to enforce his mortgage against

[14] Flagg v. Geltmacher, 98 Ill. 293.

any or all parts of the land, as between the mortgagor and his transferee, the land held by the mortgagor is liable for the whole debt.[15]

§ 27. **Same: Successive transfers.** We have assumed so far that the portions of the land conveyed away at first were all conveyed at the same time. Suppose that the land was conveyed in four portions, the conveyances being several weeks apart, and that none of the transferees assumed the debt. The part conveyed last would, as the other three parts, be the one primarily liable for the whole debt, it being the last part owned by the mortgagor. Now, the same principle applies to all the four conveyances. When the first part is conveyed, then the rest of the land is primarily liable before this first part and remains so. All the three subsequent parts should be sold and applied to the debt before the part first conveyed. The third and fourth parts would likewise be liable before the second part, and the fourth part before the third. To state the principle in the form often used, the land so conveyed in portions at different times is liable in "the inverse order of alienation."[16] A different rule applies where any grantee of a portion of the mortgaged land assumes the debt, for the one who assumes the debt becomes by his contract personally bound to pay it. If, then, other grantees have to pay the debt to save their land, such grantees would be subrogated to and entitled to enforce the mortgagee's right against the grantee who assumed the debt.

## Section 4. Transfer of Debt or Mortgage.

§ 28. **Express transfer.** In "title theory" states, since the mortgagee has the legal title to the land, in order to make a complete legal transfer of the mortgage there must be a conveyance sufficient to pass title to land. Some of these states have provided by statutes simple forms of transfer. In any event, the transfer ought to be in writing, and should be recorded in order to protect the assignee against subsequent bona fide purchasers.

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[15] Inglehart v. Crane et al, 42 Ill. 261.

[16] Clowes v. Dickenson, 5 Johnson's Chancery 235.

**§ 29. Transfer of mortgage debt without mortgage.** In equity, since the making of the mortgage is regarded as a transaction for the purpose of securing a debt, the debt is the principal thing and the mortgage a mere incident to the debt. The mortgage is not enforceable except by the owner of the debt. If the debt is assigned, the assignee has the benefit of the mortgage, and, in many states, all the rights and remedies of the mortgagee are conferred on him. Where the mortgagee has the legal title and assigns the debt alone, he holds the mortgage in trust, after assignment, for his assignee.

**§ 30. Assignment of part of mortgage debt.** If a part of the mortgage debt is assigned, the assignee is entitled to the benefit of the mortgage security. The debt is frequently evidenced by several promissory notes or bonds, so that one or more of these may be assigned and the best retained. The assignee of one of the mortgage notes or bonds, being owner of a part of the mortgage debt, is entitled to share in the benefit of the mortgage security.

**§ 31. Transfer of mortgage without debt.** In "title" states the transfer of the mortgage without the debt gives the transferee only the bare legal title, which he holds in trust for the owner of the mortgage debt. In "lien" states a transfer of the mortgage without the debt is of no effect at all—it is a nullity, for the legal title is in the mortgagor and the right to the mortgage security is in the owner of the debt.

**§ 32. Effect of transfer upon equities against mortgagee.** The mortgage debt is a "chose in action," or a right to proceed against someone in the courts. When such a right is not in the form of a negotiable instrument, an assignee takes it subject to all defenses that can be made against the assignor, but, if a negotiable instrument is transferred, by the law of negotiable instruments a transferee for value without notice takes free from defenses against the transferor. See Chapter XI, §§ 1-5. These rules apply to debts secured by mortgages as well as to other debts. Thus, if a debt is in the form of a non-negotiable note for $1,000 and is assigned, the assignee gets no greater rights than the assignor had. If only $500 is actually due, the assignee can enforce it for only $500, regardless of whether he knew this fact

when he took the assignment of the debt or not. If the note is negotiable, however, and the assignee takes it for value, before maturity, and without notice that only $500 is actually due, he takes it free from defenses against the assignor and can enforce it for the full amount. In most states, where the mortgage debt is negotiable in form, the assignee before maturity and for value without notice can not only enforce the note personally against the mortgagor in full, but can likewise enforce the mortgage which secures it. To illustrate, in a certain case the plaintiff took a negotiable note secured by a mortgage, for value before maturity, without notice of any defense which the mortgagor had against the mortgagee, and brought a bill to foreclose the mortgage. The mortgagor claimed he had given the mortgagee a lot of flour to sell and apply the proceeds to the payment of the note, and that the value of this flour should be deducted from the mortgage debt. The court held that, since the plaintiff had no notice of this arrangement, he could enforce the mortgage for the full amount of the note.[1]

§ 33. **Same: Contrary view.** A few states hold, however, that though the note is subject to the law of negotiable instruments, the mortgage is not; and while the note can be enforced free from defenses of which the assignee had no notice, the mortgage, if enforced, is subject to all defenses against the mortgagee. In an Ohio case a negotiable note secured by a mortgage was transferred to the plaintiff, who was a bona fide purchaser for value without notice. The action was a bill to foreclose the mortgage. The note had been given in payment for a patent, but the transaction was so fraudulent that it could not be enforced by anyone who had notice of such fraud. The court held the plaintiff could not enforce the mortgage where this fraud was set up as a defense, for the negotiable character of the note did not extend to the mortgage which secured it.[2]

§ 34. **Record of assignment.** Assignments of mortgages should be recorded in order to charge subsequent purchasers with notice of the rights of the assignee. Otherwise, assignments will not be good as to persons who subsequently deal with

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[1] Carpenter v. Longan, 16 Wall. 271.

[2] Bailey v. Smith, 14 Ohio State, 396.

the mortgagee without notice, thinking he is still owner of the mortgage. The record of the assignment, however, is not notice to the mortgagor, for his right is prior to the assignment; and he can safely go on dealing with the mortgagee as owner, making payments, etc., until he has actual notice of the assignment. Therefore, an assignee of a mortgage should always notify the mortgagor or his successors of the assignment.

### Section 5. Payment, Redemption, and Discharge.

**§ 35. Payment before default by mortgagor.** At common law payment of the mortgage debt, at or before the time it was due, the "law day," as it was called, terminated the mortgage and revested the title to the land in the mortgagor, upon entry by him, without any further formality. A tender of the money when due, according to the condition in the mortgage, also terminated the mortgage, and it could not thereafter be enforced, though the mortgagee could still enforce the debt personally against the mortgagor. This is still the law in "title theory" states. However, the mortgage, if recorded, will remain a cloud on the title to the land until the record shows it is released, which should be done in all cases.

**§ 36. Same: After default.** At common law if the debt was paid after default, a reconveyance was necessary to revest title in the mortgagor. This is true in most "title theory" states today. Where the "lien theory" prevails, payment completely extinguishes the mortgage lien and tender has the same effect, except that it must be kept good—that is, the mortgagor must be ready to pay at any time if payment is demanded. In such states there is no legal title to be conveyed, for the mortgagor retains the title. If the mortgage is recorded, the record will constitute a cloud on the title, if it does not show a discharge; so a formal discharge should be obtained and the mortgage released of record. In any state, if the mortgagee refuses to give a release voluntarily, he can be compelled to do so by a bill in equity to remove the cloud on the title, or by proceedings provided by statute for this purpose.

**§ 37. Enforcement of right of redemption.** At any time after default and before the mortgage has been foreclosed, the

mortgagor may exercise his right to redeem from the mortgagee, unless his right has been barred by lapse of time. If the mortgagee refuses to consent to redemption, as where he is in possession claiming he has an absolute deed to the land, the mortgagor has to file a bill in equity to redeem. In such bill he must allege he is ready and willing to pay whatever the court finds due, and must, in fact, pay when ordered to do so by the court. If he does this, the court will compel the mortgagee to give up the property. This right to redeem we have seen (§ 1, above) may be cut off by a foreclosure, but even when the mortgagee does not foreclose it does not continue forever. The right to redeem may be barred by the failure to exercise it, for the law requires a man to be diligent in enforcing his rights. Equity will usually hold the right barred after the lapse of the period during which suits at law may be brought to recover land. This period is twenty years in most states, but less than that in some. There may be circumstances under which equity will declare the right barred in a shorter period. The above principle, as to barring the right by lapse of time, applies only when the mortgagee is in possession, holding the land adversely to the mortgagor. If the mortgagor retains possession his right cannot be barred by lapse of time.

**§ 38. Same: Parties entitled to redeem.** All persons who acquire interests in the mortgaged land, or legal or equitable liens thereon, which are inferior to the mortgage thereon, are entitled to redeem from such mortgage. These parties are those who acquire rights subsequent to the mortgage, or those whose rights, though prior in time, are inferior to the mortgage; as when the mortgagee is a bona fide purchaser without notice of an equitable lien, or when he recorded his mortgage first and thus got priority over former unrecorded mortgages. Thus, the right to redeem may be exercised by purchasers of all or part of the land from the mortgagor or his assignee, by heirs or devisees of the mortgagor, by subsequent mortgagees or judgment creditors, or by a wife or husband having dower rights in the land. One whose right is prior to the mortgage, as a prior mortgagee, or one with no interest at all, cannot redeem.

**§ 39. Amount required to be paid for redemption.** Any

person who redeems from a mortgage must pay the entire mortgage debt, with interest, and all other sums to which the mortgagee may be entitled by reason of the mortgage. All this must be paid, no matter how small the interest of the one redeeming, for the mortgage secures the whole debt and the mortgagee cannot be required to release his lien until he gets all that is due him. Thus, where the widow of the mortgagor, having a dower interest amounting to the use of one-third of the land for life, filed a bill to redeem, the court held she could redeem only on payment of all sums due under the mortgage.[3]

**§ 40. Contribution and indemnity between parties redeeming.** The doctrine of contribution is an equitable doctrine to the effect that, when there are two or more persons equally liable for a debt and one pays it all, he is entitled to have each of the others contribute his share of the debt. Chapter XII, § 13. This right he can enforce in equity. Where there are several persons entitled to redeem from a mortgage and one pays the debt and secures the release of the mortgage, since this benefits the others by removing the lien from land in which they have interests, they can be forced to contribute to the one who redeemed. In the case of Gibson v. Crehore, stated in § 39, above, the widow, who redeemed, paid the whole debt. Her interest perhaps amounted to one-eighth the value of the land, and she was no more bound to pay than the others. Therefore, the other owners should contribute to her seven-eighths of the amount she paid to redeem. Indemnity applies when one has to pay a debt who is not primarily liable for it, as where payment is made by a surety. See Guaranty and Suretyship, as above. Such person is entitled to indemnity—that is, to repayment from the one primarily liable to pay. We have seen that, where a mortgagor transfers the land to one who assumes the mortgage, the latter is primarily liable (§ 25, above), so, if the mortgagor had to pay the debt, he would be entitled to repayment from his assignee.

**§ 41. Enforcement of contribution and indemnity: Subrogation.** Subrogation is an equitable doctrine by which one who is compelled to pay a debt for which he is not primarily liable in order to protect his interests, is entitled to stand in the place of

[3] Gibson v. Crehore, 5 Pickering (Mass.) 146.

the original creditor with all the creditor's rights against the one primarily liable for the debt, and especially with a right to the securities which the creditor may have for the debt. See Guaranty and Suretyship, Chapter XII, § 12. The rights of contribution and indemnity explained in the preceding subsection are usually enforced by applying the doctrine of subrogation. For example, in the case where the widow having a dower interest redeemed from a mortgage [4] the court said she was entitled to contribution from the other owners. She had no way of enforcing this right directly, for there was no contract relation between the parties. All of them apparently had gotten their interests through the death of the mortgagor. Hence, the only way to enforce contribution would be by allowing the widow the rights which the owner of the mortgage had against the land. He had a mortgage on the land, so the court said the widow could enforce this against the land to the extent of the money rightfully due her. In general, any person entitled to redeem, who redeems, may be subrogated to the rights of the mortgagee against the land and against other owners of interests in the land, provided he is not primarily liable for the debt.[5] Also, anyone who pays off the mortgage at the request of the one primarily liable, with the understanding that he is to have the benefit of the mortgage, has the right of subrogation; but if a stranger voluntarily pays the debt he has no such right.

**§ 42. Marshalling securities.** Suppose a debtor has two tracts of land. One man has a mortgage on both tracts to secure a debt, and another man has a second mortgage on one of the tracts. If the first mortgagee enforces his right against the land covered by the second mortgage, and exhausts the security, the second mortgagee will have nothing. Ordinarily, the first mortgagee has the right to enforce his lien as to any portion of the land. But there is a principle in equity that one who has two funds, out of which he can secure satisfaction of his debt, shall not by his election disappoint one who has only one of the funds to proceed against. This applies to the first and second mortgagees in such a case. While the first mortgagee may enforce

[4] Gibson v. Crehore, §§ 39-40, above.
[5] Bergein v. Brehm, 123 Ind. 160.

against the land covered by the second mortgage, if there is not enough left to pay the second mortgagee's debt, the latter is entitled to be subrogated to the first mortgagee's right against the other tract of land, provided it will not prejudice the mortgagor or any third person.[6]

### Section 6. Mortgage Foreclosures.

**§ 43. In general.** As has been previously stated (§ 1, above), foreclosure was allowed in order that the mortgagee might have a means of putting an end to the equity of redemption, and on foreclosure the right to redeem was cut off and the mortgagee got the land. This was called strict foreclosure. Now the decree for foreclosure usually orders a sale of the property and a payment of the debt out of the proceeds. Any surplus is turned over to the mortgagor. The mortgagee cannot get the land, unless he buys it at the sale. Strict foreclosure is not allowed except in special cases, because the land may be worth far more than the mortgage debt and the mortgagee is only entitled to the money due him.

**§ 44. When right to foreclose arises.** The owner of a mortgage has a right to foreclose as soon as the mortgagor fails to perform the obligation secured by the mortgage, usually when he fails to pay the debt when due. The mortgage, however, often provides that, if the interest on the debt is not paid when due, the whole debt shall immediately be due and payable and foreclosure may be had, or, it may provide that the right to foreclose shall accrue on failure of the mortgagor to pay taxes, keep up insurance on the premises, or on default of some other obligation calculated to affect the security for the debt.

**§ 45. When right to foreclose is barred by lapse of time.** We saw in a preceding subsection (§ 37) that when the mortgagee is in possession of the land the right to redeem may be barred by lapse of time. Likewise, if the mortgagee fails to exercise his right to foreclose his mortgage within a certain time, his right will be barred. When there is no express statute of limitations, equity usually declares the right barred after the

[6] Andreas v. Hubbard, 50 Conn. 351.

lapse of the period within which actions for the recovery of land may be brought. After the lapse of this period, it is presumed that, since no effort has been made to enforce the mortgage, it must have been satisfied. This presumption that the mortgage was satisfied may be overthrown, however, by showing that within the period the mortgagor has acknowledged that the debt is unpaid, by making a payment or by some other act. The other right of the mortgagee—the personal right against the mortgagor—comes within various other statutes of limitations, and the action on it will be barred within the period provided for in the statute which applies. These statutes vary as to different kinds of obligations, and vary in different states. The time within which the personal action is barred is almost always less than that within which the right to foreclose will be barred. In most states the mortgage can be foreclosed after the right to sue the mortgagor personally is barred. In a New York case a mortgage had been given to secure a promissory note, and in that state the action on a note is barred six years after the right to sue arises, if there has been no acknowledgment of the debt meanwhile. A bill to foreclose the mortgage was started nineteen years after the note was due. Foreclosure was not barred in New York until after twenty years. There had been no partial payment or other act acknowledging the debt since it became due. The court held that, though the right to sue on the note had long been barred, the right to foreclose might be exercised at any time within twenty years and that foreclosure should be allowed.[7] In a few states the mortgage is regarded as so much an incident of the debt that it cannot be enforced after the right to enforce the debt is gone. In an Illinois case, the debt was in the form of a promissory note, and actions on such notes are barred after ten years. A bill to foreclose the mortgage was filed more than ten years after the debt was due, and the court held that the mortgage, being a mere incident to the debt, could not be enforced after action on the note was barred.[8]

§ 46. **Strict foreclosure.** Strict foreclosure is a foreclosure by which the mortgagee gets the land free from the right of re-

[7] Pratt v. Huggins, 29 Barb. 277.
[8] Harris v. Mills, 28 Ill. 44

demption. The decree provides that if the debt is not paid by a certain date the right to redeem shall be gone forever. Strict foreclosure is not allowed when the land is worth more than the amount of the debt, for it would result in the mortgagee getting more than he is entitled to. It is allowed in many states when the rights of the mortgagor will not be prejudiced. When the land is not sufficient to satisfy the mortgage debt, strict foreclosure may be had without injustice to anyone. By it the rights of the mortgagor and of persons who have junior liens can be cut off. A strict foreclosure satisfies the mortgage to the extent of the value of the land and the mortgagee can sue the debtor personally for any unsatisfied part of the debt.

**§ 47. Foreclosure by entry and by writ of entry.** Foreclosure by entry and by writ of entry are forms of foreclosure provided for in some of the New England states. The effect is similar to that of strict foreclosure, the mortgagee getting the land and the debt being satisfied to the extent of the value of the land.

**§ 48. Equitable proceeding for sale of mortgaged premises.** The usual method of foreclosing a mortgage is by a proceeding in equity, or a proceeding under some statute provided for the purpose, to sell the land and pay the debt out of the proceeds. The sale is made by a master in chancery or some other officer of the court, who gives the purchaser a deed to the land, pays the mortgagee the sum due him, applies the surplus, after deducting the costs, to any junior lien which may be on the land, and pays any remainder, after all claims are satisfied, to the mortgagor. A purchaser at a foreclosure sale in a "title theory" state gets whatever record title the mortgagor had when he made the mortgage. His title is good as to all persons whose rights were inferior to the mortgage. He takes subject to all rights superior to the mortgage which was foreclosed. Hence, when a second mortgage is foreclosed, the purchaser at the sale takes subject to the first mortgage and the first mortgagee may foreclose at any time. The purchaser knows this or can easily find it out, so of course he will bid only what he is willing to pay for the land subject to the first mortgage. In many states the statute gives a short period—from six months to two years usually—within

which persons entitled to redeem may redeem after foreclosure sale, the purchaser getting his deed after this time has expired. This is a purely statutory right and did not exist at common law.

**§ 49. Mortgage with power of sale.** It is often provided in a mortgage that, on default by the mortgagor, the mortgagee may sell the land without judicial proceedings. Such a "power of sale" is valid in most states, though there are a few states which refuse to allow a sale except by judicial proceedings. The power of sale makes the mortgagee the agent of the mortgagor to sell the land, and therefore the principles of the laws of agency apply. Death of the principal terminates an agency, unless it is what is called an "agency coupled with an interest." See Agency, Chapter II, § 28. In "title theory" states the mortgagee has an agency coupled with an interest, so, if there is a power of sale in the mortgage, the death of the mortgagor does not revoke the power to sell the land. The beneficial interest of the mortgagee, even in "lien theory" states, is generally held sufficient to satisfy this doctrine, though in a few states the power is terminated by the death of the mortgagor. All agree that there is such an interest that the mortgagor cannot revoke the power of sale during his lifetime. Statutes usually provide that the sale must be public, after proper notice of it has been given. In the absence of statute the sale may be private. Since a mortgagee selling under a power of sale is acting as agent of the mortgagor, he is not allowed to purchase at the sale, unless the mortgagor gives him permission; for an agent cannot himself purchase what the principal has given him power to sell, unless the principal consents. The purchaser, at a sale made under the power given in the mortgage, gets, in a "title theory" state, the title which the mortgagor had when he made the mortgage, because that title is in the mortgagee who makes the sale. Therefore, a purchaser takes free from all subsequent liens and is in as good a position as if he had bought at a foreclosure sale. The same result is reached in "lien theory" states, since the exercise of the power conveys the title as it was when the lien became effective.

**§ 50. Sale under trust deed.** When a trust deed is given to

secure the payment of a debt it is regarded as a mortgage. The trustee is given power to sell the land and apply the proceeds to the mortgage debt, if default is made in payment of the debt. A sale by such a trustee passes to the purchaser the title which the trustee has. A trustee, like a mortgagee, selling under a power of sale, is not permitted to purchase the property himself. On sale, either by a trustee under a trust deed, or by mortgagee under a power of sale, the surplus proceeds after the debt is paid belong to the mortgagor.

§ 51. **Effect of mortgage providing for attorneys' fees.** An agreement in the mortgage that, in the event of foreclosure, a certain sum shall be allowed for attorneys' fees is found in many mortgages. But if the courts consider the amount named in the mortgage too large, they will allow only what they consider reasonable.

§ 52. **Parties entitled to foreclose: Mortgagee and assignees.** The mortgagee is the proper person to foreclose, if he still owns the mortgage debt. If he has assigned the mortgage debt, even without the mortgage, the assignee is the one who then has the right to enforce the mortgage. A mortgagee who has assigned the debt no longer has any right to foreclose, for, even though he has not transferred the mortgage and still has the legal title to the land, he only holds this in trust for the benefit of the owner of the debt; but, as the holder of the legal title, he should be made a party to the suit so that the court can, at the sale, pass this title to the purchaser. Any person who owns a portion of the debt has the benefit of the security, and hence may foreclose the mortgage. If he cannot get the other owners to join him as parties plaintiff, he must, in his bill to foreclose, make them parties defendant, in order to pass a clear title to the purchaser at the sale, for, whatever rights they have in the land, will persist unless they are made parties to the suit. Rights of those interested, either in the debt secured or in the land, cannot be cut off unless they are made parties to the suit; but, if made parties, they may assert such rights and will be bound by the decree of the court.

§ 53. **Same: Personal representatives of mortgagee or assignees.** On death of the owner of the mortgage, the debt, being

personal property, passes to his personal representatives, and with it the right to foreclose. If he had the legal title, this passes as real estate to his heirs or devisees, who hold it in trust for the benefit of the owner, just as the mortgagee would hold it after he assigned the debt.

**§ 54. All parties interested in land should be joined in foreclosure.** The purpose of foreclosure is to cut off all rights to the land inferior to the mortgage. It is therefore necessary that all persons, who have interests which would entitle them to redeem, should be made parties to the suit, so that the decree of the court will be binding on them. Those not made parties will not have their rights cut off by the decree. Persons who assert adverse claims to the land, paramount to the mortgage, need not be made parties. Their rights, if valid, are superior. The foreclosure only cuts off inferior rights and the land is sold subject to all superior liens.

**§ 55. Deficiency decrees in foreclosure proceedings.** We have seen that the mortgagor is personally liable for the mortgage debt. A mortgagee can sue him at law and foreclose the mortgage at the same time. The fact he has started one proceeding does not bar the other, but he can pursue both remedies until the debt is satisfied. Formerly, if he foreclosed and sold the land and the proceeds were not sufficient to satisfy the debt, he had then to sue at law to recover the deficiency. In most states today, statutes provide that the court, in a foreclosure proceeding, may provide for a deficiency decree. If the proceeds of the sale pay only part of the debt, the court will then enter a decree for the remainder of the money due, and the mortgagee can levy execution against other property of the mortgagor. Thus the mortgagee gets the sale of the land and a judgment for the debt unsatisfied, in the one proceeding.

## CHAPTER IX.

## LANDLORD AND TENANT.

**§ 1. Lodger and tenant distinguished.** An entire floor, a series of rooms, or a single room, may, no doubt, be let for lodgings and so separated from the rest of the house and given over to the possession of the lodger as to create the relation of landlord and tenant between him and the proprietor of the house. But when one contracts with the keeper of a hotel or boarding-house for rooms and board, or for rooms alone, whether for a week or a year, the technical relation of landlord and tenant is not created between the parties. The lodger acquires no interest in the real estate. If he is turned out of the rooms before the end of the time agreed on, he cannot maintain ejectment nor in any way recover the possession of the rooms; the contract does not have to be in writing to be valid, though there be a statute requiring leases for such a term to be written; and the right of the keeper of the house to seize his goods to compel payment of his bill, must be found either in his right at common law to a lien as a public inn-keeper against a guest, or in the statutes extending that right to boarding-house keepers—it cannot be sustained on the common law or statutory right of a landlord to distrain for non-payment of rent.

**§ 2. Flats, office rooms, apartments, and desk-room.** On the other hand, one may by contract and occupancy become tenant of an apartment, flat, or even desk-room in an office, provided there is that exclusive possession and right of possession essential to an interest in the realty. It is not necessary that there be an exclusive outside entrance; the tenants of flats and suites in apartment houses and office buildings seldom have that, and yet, if they have the exclusive possession, the relation of landlord and tenant exists. This relation may exist though the contract

requires the lessor to furnish light, heat, water, or even a janitor to sweep out. One who rents a furnished cottage with right of exclusive possession and makes entry becomes a tenant.

§ 3. **Agent, servant, or tenant.** The occupation by a servant incident to his employment does not create the relation of landlord and tenant; but the distinction is sometimes very close. The occupancy of the schoolhouse by the teacher and the duty to keep it in order does not make him the tenant of the school-district. A man hired to work and have charge of a farm, and by his contract required to occupy the farm house and provide meals and beds for the workmen on the farm and care for the animals, milk, etc., on the farm, was held not to be a tenant nor entitled to any notice to quit on being discharged, though the housing of his family was part of the consideration for his services: the work ended, the right ended.[1]

§ 4. **Same: Illustration.** On the other hand, a quarry company was held liable in trespass for removing from their boarding-house without notice the goods of the keeper, who occupied under a contract to devote his entire time to the management of the house, pay $65 per month as rent, and receive for his services only $4.50 per week each for boarding such men as the company should send to him.

§ 5. **Necessity of writing. Statute of frauds.** By the statute of frauds, 29 Car. II (1677), c. 3, § 1, it was declared that all leases for more than three years should from thenceforth be reduced to writing and signed by the parties making them or by their agents thereunto lawfully authorized by writing. Statutes in substantially the same terms will be found in all the states, patterned after this statute, and varying from it only in that many of them require all leases for more than one year to be in writing.

§ 6. **Dangerous premises: Liability to third parties.** At common law the liability of the occupant of land for injuries to others upon the land due to the condition of the premises depends upon the relation of the injured person to the occupant, whether trespasser, licensee, or invited person, and upon whether

[1] Bowman v. Bradley, 151 Pa. St. 351.

the occupant actually knew of the danger or could have discovered it by reasonable inspection. See Chapter III, §§ 73-80. For a nuisance, injurious to persons off the land, the occupant of the offending premises is liable. A land owner cannot escape liability for injuries by a nuisance on his land by leasing it, and if the tenant continues the nuisance, any third person injured thereby may sue and recover for his injuries of either the tenant or the landlord, regardless of whom the lease bound to make repairs, or he may sue the landlord and tenant jointly. Similarly both parties are liable if the lease contemplates such a use of the premises as will be a nuisance.

It is commonly said that the landlord is also liable to strangers for nuisances which he has agreed with the tenant to guard against, although the premises are in possession of the tenant.[3]

**§ 7. Same: Liability of lessor to tenant.** In the absence of statute, contract to repair, or warranty of condition, both the landlord and tenant must use reasonable care and diligence to avoid exposing others to or being themselves injured by, a dangerous condition known to them; and if through their negligence in this respect injury results to themselves or others they must bear the loss or make satisfaction for it. "If the tenant neglect such reasonable care and diligence to ascertain the condition of the premises, or, knowing their condition, assumed the risk, then he cannot recover against the landlord. On the other hand, if the landlord neglect to use reasonable care and diligence in ascertaining whether his premises are safe, or if he actually knew they were unsafe, and conceals or misrepresents their condition, then he is liable, the tenant being without fault. It is not upon the ground of an insurer or warranter of condition under his lease or contract, but on the ground of the obligation implied by law not to expose the tenant or the public to dangers which he knows or in good faith should know, and which the tenant does not know and cannot ascertain by the exercise of reasonable care and diligence. The cases are numerous which use the expressions laid down in the opinion in this case, that the land-

[3] Ahern v. Steele, 115 N. Y. 203 (collecting cases). Contra: Clyne v. Helmes, 61 N. J. L. 358.

lord is liable, not only for actual knowledge, but also for reasonable care and diligence in obtaining such knowledge—not only when he knows, but when he ought to know, of the defects, by using ordinary care and diligence." The above quotation is from a case in which a lessor was sued by his lessee and her boarders for personal injuries each received from the collapse of the porch to the house due to defective construction and decayed condition not so obviously dangerous as to deter an ordinarily careful person from using it.[4]

§ 8. **Same: Lessor's promise to remedy.** In another case the court held the lessor liable to the tenant in damages for the death of the tenant's child by drowning in a cistern known to the tenant to be unprotected when he went into possession, wherefore he was charged with contributory negligence and also was charged to have assumed the risk, though the lessor had promised when the lease was made to fix it. The court said: "If it can be said that the master, by specially agreeing to remedy a certain defect, assumes to be responsible for any injury caused thereby, until he can have a reasonable time to repair, it can with like reason be said that the landlord who undertakes and promises to remedy or repair a certain known and specific danger existing on the rented premises at the time and before they are rented, assumes the responsibility for an injury caused by such dangerous place, until he have a reasonable time in which to repair, providing, of course, that care is exercised to avoid falling into the dangerous place, or to avoid injury from the known defect."[5]

§ 9. **Same: In control of lessor.** The lessor is not excused from liability to his tenants for injuries resulting from dangerous conditions maintained on his own premises even by binding the tenants to keep their premises in repair, as where a tenant in covenant to keep his rooms in repair was injured by the explosion of the heating apparatus in the possession of the landlord in his basement.[6] The same is true of parts of the premises

[4] Hines v. Wilcox, 96 Tenn. 148.
[5] Stillwell v. South L. L. Co. (Ky.), 52 L. R. A. 325.
[6] Ralton v. Taylor, 20 R. I. 279.

used in common by tenants of property (passageways, stairs, etc.) but controlled by the lessor. See § 11, below.

**§ 10. Lessor's liability for repairs and improvements.** In the absence of statute or promise in the lease the landlord is not bound to make repairs or improvements, or to make good loss or injury suffered from want of them. In an action by a tenant against a landlord for damages to his goods, from failure of the landlord to make repairs promised after the lease was made in order to induce the tenant not to leave the building, the court said: "In the lease of a store or warehouse, there is no implied warranty that the building is safe, well built, or fit for any particular use. So, in a lease of a house there is none that it is reasonably fit for habitation. . . . When it is agreed that the landlord shall do the repairs, there is no implied condition that the tenant may quit if the repairs are not done. . . . In the absence of any special agreement, the tenant takes the risk as to the future condition of the premises leased. The tenant takes the premises for better and for worse, and cannot involve the landlord in expense for repairs without his consent."[7]

**§ 11. Same: Appurtenances under lessor's control.** To the rule that the landlord is under no obligation to repair there is an exception in the case of appurtenances not in the exclusive possession of the tenant. For example: It is recognized that this rule does not apply to those portions of his property (such as passageways, stairways, and the like) that are not demised to the tenant, but are retained in the possession or control of the landlord for the common use of the tenants and those having lawful occasion to visit them, the ways being used as appurtenant to the premises demised. With respect to such ways, it has been held that the landlord is under the responsibility of a general owner of real estate who holds out an invitation to others to enter upon and use his property, and is bound to see that reasonable care is exercised to have the passageways and stairways reasonably fit and safe for the uses which he has invited others to make of them.

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[7] Libbey v. Talford, 48 Me. 316. But see Ehinger v. Bahl, 208 Pa. St. 199, holding lessor liable for injury to goods from fall of house after notice and promise to repair, the lease being from month to month.

**§ 12. Liability of landlord for repairs and improvements made by tenant: In general.** In the absence of contract or statute, the law imposes no obligation on the landlord to pay the tenant for repairs or betterments made by him, and the tenant cannot even set them off against his liability to pay rent. "The tenant is presumed to repair and improve for his own benefit; and his right to the result of his labor expended for that purpose is to reap the enhanced benefit during the term, and, within certain limitations, to remove the improvements before its expiration. It is only by virtue of an agreement by the landlord to pay for improvements that the tenant can recover their value of him.

**§ 13. Liability of tenant to make repairs and improvements: In absence of contract.** In the absence of any contract the tenant is bound to repair or make good all injuries to the premises due to his negligence or wrong, and to make such slight incidental repairs as are necessary to keep the buildings wind and water proof; but he is not bound to make substantial repairs, make good the natural deterioration from ordinary wear and tear, or replace old materials with new. For injuries to the premises from reasonable use according to the lease, or for destruction from accident without negligence on his part he is not liable. But if he uses the premises for a purpose in violation of his contract he does so at his peril. Subtenants are under the same liability. A lessor was permitted to recover against a sublessee for the destruction of a warehouse resulting from the storing of cotton in it, a risk not contemplated by the lease; and it was held to be no defense that the lessor had already recovered the amount of his loss from a fire insurance company, which was a matter wholly between the owner and the insurance company for which the insurers had been fully paid by the premiums.[8] Of course the burden of proving the negligence of the tenant and that it produced the loss is on the party seeking to recover because of it.

**§ 14. Same: Under contract.** When the tenant has covenanted to make repairs he is bound to do so. If the covenant is general he must make the repairs regardless of the cause of

[8] Anderson v. Miller, 96 Tenn. 35.

the damage, unless it be the fault of the lessor himself. If there is a total destruction of the premises from inevitable accident this general covenant requires the tenant to rebuild, except where there are statutes, as there are in a few states, that such covenants shall be given a narrower construction unless the intention of the parties is clearly expressed that the tenant shall be bound to rebuild. An agreement of the tenant to repair or build requires him to furnish and pay for the materials with which to make the repairs. In this case also the fact that the landlord's loss has been made good by insurance is no defense to the lessee for breach of this covenant. "In the present case, although the defendant had, under his hand and seal, stipulated that he would keep in repair, support, and maintain the fences and buildings, with the exception of natural decay, he was undoubtedly astonished at being called upon to rebuild a house, the use of which he had enjoyed but for a year; and yet he has, in express terms, covenanted so to do. His excuse would be that he never read the covenants in his lease, or that he did not understand the force and effect of the terms. But the law does not protect men from their own carelessness or ignorance. The former they must cure; the latter they must provide against by asking counsel."[9]

A general covenant to repair, or to keep the premises in repair merely requires him to keep the premises in the condition in which they are at the time of the lease, and he is not bound to put them into tenantable condition, or make repairs or changes that may be required by the public authorities, unless the lease provides that he shall put them into tenantable condition and make such repairs or alterations as the public authorities may require. A covenant to keep in repair requires that the repairs be made as needed to avoid injury and deterioration of the property. But a covenant to make repairs or improvements, or to put the premises into a tenantable condition, without specifying the time within which the repairs or improvements shall be made, gives the tenant the whole term in which to make such repairs or

[9] Phillips v. Stevens, 16 Mass. 238.

improvements, and he is not liable to suit of forfeiture during that time for his failure to do so.[10]

**§ 15. Same: Tenant's assigns.** Covenants by the tenant to make repairs and improvements run with the lease, and the reversion, binding him and his assigns to the lessor and his heirs and grantees. The lessee does not diminish his liability by assigning his lease, for his liability is founded on his contract.

**§ 16. Receipts for rent, application of payments, and mistakes.** The lessee making payment of rent has a right to demand a receipt under the hand of the lessor or his authorized agent. Such receipts are presumptive evidence of payment but may be explained and disputed. A receipt for one month's rent raises a presumption in the absence of indication to the contrary that the rent prior to that has all been paid. The lessee has a right at the time of making the payment to direct how it shall be applied, whether to the past or future, and to what month; but if he does not then specify how it shall be applied, the lessor may apply it to any demand due that he has against the lessee.

**§ 17. Remedies of landlord for rent.** The principal remedies of the landlord for the recovery of the rent are the seizure of the lessee's goods on the leased premises, under a distress by virtue of common law, lease, or statute; the enforcement of a lien on the tenant's goods therefor, given by the lease or by statute; an action of covenant, debt, assumpsit, or for use and occupation; or a right to enter and oust the tenant for breach of condition in the lease, that if he or his assigns fail to pay the rent due at the appointed time the lessor or his heirs may enter and terminate the lease, and the lessee and all claiming under him remove and put out, and thereupon bring ejectment. The condition is no redress in itself; it merely enables the landlord to stop further accumulation of rent, and terrorizes the tenant to pay for fear he will lose his lease.

**§ 18. Distress: In general.** The common law distress was not in itself a remedy, but merely a coercive measure to embarass the tenant till he would pay to be relieved. Where the right to

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[10] Chipman v. Emeric, 5 Cal. 49. But see Wilson v. Owens (1897, Ind Ter.), 38 S. W. 976.

take distress now exists it is so regulated by statute as to avoid most of its common law rigors, and reduce it to a summary process for recovery of rent. It is believed that there is no right to take distress in Alabama, Michigan, Massachusetts, Minnesota, Missouri, Montana, New York, North Carolina, Oklahoma, Wisconsin, and probably other states. This remedy is available only for non-payment of rent, and is not available as a remedy for breach of other covenants; but where personal property is leased with the premises for one rent, distress for the whole lies. Unless the relation of landlord and tenant exists this remedy is not available. Distress lies for rent in money, produce, service, or whatever it be, so it is rent.

**§ 19. Lessor's lien for rent: Validity against tenant's creditors and vendees.** In the absence of statute or agreement between the parties there is no lien in favor of the landlord on the goods of the tenant for the payment of the rent. And while they may make an agreement that will be good between themselves, if supported by sufficient consideration, without any writing to prove it, (unless made before or at the time of the lease so as to be impliedly abandoned unless embodied in the writing); yet as against subsequent purchasers in good faith without notice, such an agreement is void unless it is written and recorded as required by the law concerning chattel mortgages to make them valid against creditors and purchasers, for such an agreement is in substance a chattel mortgage. It is not a pledge, because the lessor is not in possession. Likewise, an agreement by the tenant to execute to the landlord a mortgage to secure the rent, or to pledge personal property to him for that purpose, gives the lessor no rights against the tenant's creditors and vendees without notice if the mortgage has not been given or is not properly made or recorded, or the pledge has not been made and deposited. An agreement between the parties that the tenant's property shall not be removed from the premises till the rent is fully paid is personal and not binding on the tenant's creditors and vendees without notice.

**§ 20. Same: Special statutory liens.** Where statutory liens in favor of the lessor exist, he must pursue the statute to make them effective; and the statutes differ very much in terms.

As a general rule it may be said these statutes extend only to rent and supplies furnished by the lessor, and will not be extended by the courts by construction. The rent includes all rent in arrear, and in some states rent to accrue, also the costs and expenses of the proceedings to force payment. The supplies include only supplies furnished by the lessor himself. He has no lien by reason of merely guaranteeing payment, but it is not necessary that the supplies pass through his hands. The lien covers only property of the tenant that has been on the premises unless the statute plainly includes more. It does not extend to the proceeds of property sold, nor to insurance money for property destroyed, nor to property of third persons, nor to choses in action of the tenant. Where it extends to crops raised on the premises, as it usually does, it includes crops raised by the undertenants of the tenant. A stranger dealing with the tenant and learning facts which put him on inquiry, and which if pursued would inform him of the landlord's lien for rent, is charged with knowledge of the lien, and if the statute creating the lien provides no protection for persons having no notice thereof, they are postponed to the claims of the landlord for rent whether they knew of his lien or not. A landlord may expressly waive his lien; or he may do acts which will estop him from claiming it against certain persons, as if he says he has been paid or does other acts on which other persons rely and act to their injury; or he may impliedly waive the lien, but taking other security is not a waiver. The proper remedy for enforcement of the lien depends on the provisions of the statute.

§ 21. **Attachment for rent.** In a number of the states the statutes provide for a peculiar attachment in favor of lessors for the recovery of rent, differing from the ordinary attachment open to any creditor. If a lessor proceeds under the general law of attachment open to all creditors he must comply with it to succeed, and if he proceeds under the attachment for lessors he must show in his papers what that law requires to be shown and must obey it, and cannot succeed by proving and proceeding as required by the general attachment law. This peculiar remedy is available only for the recovery of rent, not to recover on demands for breach of other covenants in the lease. Under most of

these statutes the attachment is limited to property subject to the landlord's lien. The only safe guide as to the procedure, grounds for attachment, etc., is the statute of the particular state. Under most of the statutes the grounds for attachment mentioned are acts which endanger the collection of the rent, such as removal of the property of the tenant from the premises. The remedy is limited to the lessor or the assignee of the reversion, and is not open to the assignee of the rent. For a wrongful attachment under these statutes an action for damages lies in favor of the injured tenant.

§ 22. **Fixtures.** A chattel annexed to land is called a fixture; and in another sense the word is used to include only such personal chattels as have been so annexed to land as to lose their character as chattels and become real property for certain purposes. There is no rule by which all cases can be determined; and there are cases which no rule can be certainly said to determine. The considerations which determine the question are the nature of the annexation, the adaptability of the chattel to the use of that part of the realty, the person by whom the annexation is made, and his interest in the chattel and in the land. The principal consideration is probably the nature of the annexation.

§ 23. **Nature of annexation.** If the thing is so annexed to the land that it has lost its original physical character and cannot be restored to its original condition as a practical and commercial matter, it has lost all of its chattel nature and is real property for all purposes and between all persons. For example, if A should steal B's paint and paint A's or C's house with it, the paint has lost its original character as a commercial commodity known as paint, and is not capable of being restored to its original condition as a commercial transaction; for it has been absolutely incorporated into the realty so as to lose its original character. It is no longer a chattel for any purpose or between any persons, but is inseparably annexed to and made part of the land to which it is annexed. We might go further and say that if A should steal B's shingles and with them make a roof to A's house, all that has been said of the paint would be true of the shingles; but it is readily seen, that as we progress down the scale, a point will soon be reached where B would have a right to

recover his chattel notwithstanding the wrongful annexation of it by A to his own land. It is manifest, therefore, that in only a small number of cases can the method of annexation itself, alone, be decisive of the question as to whether the thing is now land or still a chattel for the purposes of the particular case.

Indeed, it would not be difficult to imagine a case in which the thing has become real property for practically all purposes and yet is not annexed at all, as if A should steal B's ore, and with it make a key to the door of A's house.

**§ 24. Right of lessee for years and his assigns to remove fixtures.** The most definite rule that can be formulated as to the right of the lessee and his assigns to remove fixtures annexed by them if the lessor or those claiming under him object, is, that if the fixture can be removed without substantial injury to the freehold, that is, leave the land in substantially the condition it was in before the fixture was annexed, the lessee may remove it. If the lessee does not like the lock on the door of the house and puts on another in its place or in addition, and the removal of the lock he has added would leave a hole in the door, or leave it in an unsightly condition, he cannot take the lock with him. This is because he will not be presumed to have intended to do an injury to the property of another, and he will not be permitted to do so even if he so intended. But, on the other hand, he is not under any obligation to equip the premises, in the absence of contract to that effect, and so may remove anything annexed by him if its removal will leave the premises in their original condition and the thing attached will not be substantially destroyed in removal.

**§ 25. Trade and agricultural fixtures.** Upon principles of public policy, and to encourage trade and manufactures, fixtures erected for the purposes of trade are allowed to be removed by the tenant during his term.

## CHAPTER X.

## TRUSTS AND TRUSTEES.

### Section 1. Origin and Nature of Trusts.

**§ 1. Definition.** Almost everyone has at some time in his experience known of a case in which property was placed in the hands of a person called a trustee, to be held by him, not for his own use, but for that of other persons, very often children or married women. The person for whom property is so held is called the beneficiary of the trust, or, more often by lawyers, cestui que trust, or, more briefly, the cestui. When trusts first appeared in English law they were known as uses, from the fact that the person in whose hands the property was placed held the same for the use of others and not for himself.

The modern trust is in reality nothing but a development of the old use. The active uses came to be called trusts, and it is with them that we have to deal. Strictly and in essence, the modern trust is the lineal descendant of the old use, and partakes of the same fundamental characteristics. The trustee owns the property, both at law and in equity, in spite of loose language used at times by the courts which seems to indicate the contrary; and the right of the cestui is, in essence, to have the court compel the trustee to perform this conscientious obligation.

The property which is held in trust for another is most conveniently described by the term "trust-res," or "res" (Lat. res=thing, property), and we shall so call it from this on.

**§ 2. Rights against innocent purchaser for value.** Whether one who has obtained the title to the trust-res by purchase from the trustee, paying value for the same and in ignorance that it is held in trust, is subject to the trust or not depends upon the answer to the question: Would it be against equity and good

conscience for him to keep it for his own use? How can it be inequitable for him to reap the benefits of his bargain, made innocently and in good faith? Accordingly, it is a fundamental principle of equity and the law of trusts that one who thus acquires the legal title innocently and for value, holds the title to the former trust-res free from any trust obligation. Perhaps the strongest case in the books is Pilcher v. Rawlins[1] in which the defendant, who set up the plea of purchase for value without notice of the trust, could not prove his legal title without relying upon a deed which contained a statement of the trust. This deed, however, had never been seen or heard of by the defendant until after his purchase, and was not recorded. He was held entitled to keep the property discharged from the trust.

§ 3. **Constructive notice.** Under the American system of recording deeds of real estate, the recording of the deed has the same effect as actual notice (knowledge) of its contents. Accordingly, if the trust is disclosed in a deed which has been duly recorded, all persons subsequently acquiring title have what is called "constructive notice" of the trust, which, for the purpose of the rule as to innocent purchase for value, is equivalent to actual notice or knowledge.

§ 4. **Statute of frauds.** By the English statute of frauds[2] all declarations or creations of trusts of real estate "shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trusts, or by his last will in writing, or else they shall be utterly void and of no effect." In addition, all grants or assignments (transfers) of trusts are required to be in writing. Similar legislation has been enacted in this country, many states following substantially the wording of the English statute, others modifying it by requiring a deed or conveyance instead of a mere writing signed by the party.

§ 5. **Subsequent writing.** Whatever be the language of the statute, whether it says that the trust shall be "manifested and proved," or that it must be "created or declared," or "created and declared," by the writing ordered, it is almost universally

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[1] Pilcher v. Rawlins, L. R. 7 Ch. App. 259.

[2] 29 Charles II (1677), c. 3, secs. 7, 8, and 9

held that the oral declaration of a trust creates a trust, which, however, is unenforceable until the writing or deed comes into existence. The result is that a subsequent writing or deed is sufficient, and, when such a writing comes into existence, the trust becomes enforceable, and dates from the time of the oral declaration.

### Section 2. Duties and Liabilities of Trustees.

**§ 6. Duty to carry out provisions of trust.** Except only in one or two extraordinary cases, a trustee is never liable to make good any loss sustained by the estate, unless he has been guilty of some breach of duty in his management and care of the property entrusted to him. In what follows, emphasis will be laid chiefly upon those rules which will be of the greatest practical importance to trustees in the discharge of their duties, rather than upon the merely legal aspects of those rules. Every trustee is of course bound by all the provisions of the instrument creating the trust, provided those provisions are not illegal or for some other reason held to be invalid and not binding. For this reason, the first thing that one who accepts the position of trustee under a will or other instrument should do, is to acquaint himself with the terms of the trust. He should of course obtain a correct and full copy of the instrument containing the trust, and, if it be at all long or complicated, he should also have prepared for him, at the expense of the estate, an epitome of the chief provisions, which latter will be convenient for more ready reference.[3] Having obtained the copies and epitome, the trustee should read them carefully, and always keep them in mind in dealing with the trust estate. "How often does it happen that the newly-fledged trustee, provided though he may have been, either in consequence of his own prudence or by the zeal of a solicitor (not unmindful of costs), with both a copy and an epitome of the will or deed under which he acts, forthwith and after but a hasty perusal, proceeds to bury these documents at

[3] Birrell, Duties and Liabilities of Trustees, 20. Many of the practical suggestions in the present chapter were suggested by that excellent little work.

the very bottom of a tin box, which is shoved away in some rarely visited corner and locked with a key not always forthcoming. There they remain for years, unconsulted and unthought of, until, it may be, complaint is made and action threatened for breach of trust. The wise trustee keeps these informing documents in the same drawer as his cheque-book, and thus secures himself from forgetting their existence; whilst not infrequently, in those idle moments which will occur in the life of the busiest man, he refreshes his memory by glancing over their contents."[4]

The purpose of all this is of course to put the trustee in a position such that he may in all respects whatever carry out the provisions of the trust. It will not be safe to depart from them, even in seemingly unimportant matters. If he does so, he does it at the risk of having to make good to the estate any resulting loss.

**§ 6a. Duty on acceptance of trust.** Having accepted the trust, and, having obtained the papers described, familiarized himself with the terms of the trust, the trustee should, if the estate has been already in the hands of previous trustees, make an examination of the condition of the trust estate. If it consists in whole or in part of funds invested in various securities, he should see to it that those securities are of a suitable and proper kind. What are proper investments is considered in § 9, below. If the trustee fails to exercise reasonable diligence to discover the condition of the trust-estate, and so fails to learn of breaches of trust committed by the prior trustees, or of the investment of the funds on insufficient or hazardous securities, he will become liable for any loss which results, and this although he himself did not have any hand in making the original investments.[5]

**§ 7. Duty to exercise reasonable care.** In the ordinary management of the estate entrusted to his care, the trustee is required to exercise reasonable care, the care which an ordinarily prudent and reasonable man would use in his own affairs.[6] Cer-

[4] Birrell, pp. 20-21.
[5] Harvey v. Olliver, 57 L. T. 239.
[6] Speight v. Gaunt, 9 App. Cas. 1.

tain exceptions to this rule will be pointed out below. As the circumstances of no two cases are exactly alike, and as the "ordinarily prudent and reasonable man" does not exist as an objective fact, but is an ideal standard, different judges are apt to disagree in any given case as to whether the conduct of the trustee measures up to the standard or not. In one of the leading cases, it is pointed out that judges and lawyers, looking at a case after losses have actually resulted from the trustee's conduct, "are apt to think business men rash," and, in doing so, overlook the fact that conduct of the kind in question in a very large number of other cases resulted not in loss, but in saving trouble, inconvenience, and expense.[7] To do what the business community generally are in the habit of doing seems to be the exercise of ordinarily reasonable prudence and care, and in general it is. For example, at a time when Confederate money, during the Civil War, was circulating freely among people of ordinary prudence, it was no breach of duty on the part of a trustee to receive the same in payment of claims due the trust estate.[8] Had the Confederate money not been circulating freely, but in bad standing in the community, the trustee would of course have been liable for any loss resulting from its acceptance.[9]

**§ 8. Standard of care for trustee.** Perhaps one of the best statements ever made concerning the standard of care required of a trustee is that contained in the opinion of Lindley, L. J., in Whitely v. Learoyd,[10] from which the following deserves quotation: "Care must be taken not to lose sight of the fact that the business of the trustee and the business which the ordinarily prudent man is supposed to be conducting for himself is the business of investing money for the benefit of persons who are to enjoy it at some future time, and not for the sole benefit of the person entitled to the present income. The duty of a trustee is not to take such care only as a prudent man would take, if he had only himself to consider; tho duty rather is to take such care

[7] Speight v. Gaunt, 9 App. Cas. 1.
[8] Patton v. Farmer, 87 N. C. 337.
[9] Singleton v. Loundes, 9 S. C. 465.
[10] 33 Ch. Div. 355.

as an ordinarily prudent man would take, if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide. That is the kind of business the ordinarily prudent man is supposed to be engaged in, and, unless this is borne in mind, the standard of a trustee's duty will be fixed too low, lower than it has ever yet been fixed, and lower certainly than the House of Lords, or this court, endeavored to fix it in Speight v. Gaunt" (note 6, above).

Of course it is not possible for a trustee to transact personally all the business connected with the administration of a trust of any magnitude. He is accordingly entitled to employ agents to aid him, and, if he uses reasonable care in so acting, he is not responsible for any loss which may result from the default of the agents thus selected. This principle was laid down and expounded by Lord Hardwicke in ex parte Belchier,[11] perhaps the leading case upon the subject.

§ 9. **Duty in making investments.** Very often the instrument creating the trust describes the manner in which the trust fund is to be invested. In that event the trustee is bound by its provisions and must not invest in other securities. In many jurisdictions there are statutes specifying the investments trustees are permitted to make, but of course they may not invest in all of these, if the terms of the instrument creating the trust forbid. If there be no statute, and the trust deed or the will contain no directions as to investment, the rule as to exercising ordinary diligence applies.[12] Investments in government securities and good first mortgages of real estate, based upon a conservative proportion of the valuation, are in some jurisdictions the only safe investments for a trustee to make, unless in pursuance of an order of court.[13] The real estate on which a mortgage is taken should ordinarily not be situated in another jurisdiction, though the trustee may be safe in making such an investment at times.[14] The subject is too large a one for us to set forth the details here, but the only safe rule for the trustee to follow is

[11] Ambler, 218.
[12] King v. Talbot, 40 N. Y. 76.
[13] Hemphill's Appeal, 18 Pa. St. 303; Halsted v. Meeker, 18 N. J. Eq. 126.
[14] Ormiston v. Olcott, 84 N. Y. 339

to observe all the requirements of the trust deed or the will and of the statutes if any there be, and in all doubtful cases to refrain from acting without the advice of the court.

**§ 10. Trustee should not mingle trust funds with personal funds.** A rule, the non-observance of which probably leads to as many breaches of trust as the violation of all other rules put together, is, that the trustee should never under any circumstances or upon any consideration, mingle the trust funds with his own personal funds. To do so is to cross the danger line, for sooner or later it will lead in many cases to the unlawful use of a portion of the trust funds by the trustee for his own purposes.

**§ 11. Trustee must not make a profit out of trust business.** It is fundamental that the trustee must not attempt in any way to make a profit out of the trust estate, or the transaction of business connected therewith. The only exception is where, by the deed or will creating the trust, or by statute, the trustee is allowed a compensation for his time and labor bestowed upon the management of the estate. No better statement of this rule can be given than that of Lord Brougham in the leading case of Docker v. Somes,[15] as follows: "Wherever a trustee, or one standing in the relation of a trustee, violates his duty and deals with the trust estate for his own behoof, the rule is that he shall account to the cestui que trust for all the gain which he has made. Thus, if trust money is laid out in buying and selling land, and a profit made by the transaction, that shall go not to the trustee who has so applied the money, but to the cestui que trust whose money has been thus applied. In like manner (and cases of this kind are more numerous) where a trustee or executor has used the fund committed to his care in stock speculations, though the loss, if any, must fall upon himself, yet for every farthing of profit he may make he shall be accountable to the trust estate. So, if he lay out the trust money in a commercial adventure, as in buying or fitting out a vessel for a voyage, or put it in the trade of another person, from which he is to derive a certain stipulated profit, although I will not say that this has been decided, I hold it to be quite clear that he must ac-

[15] 2 M. & K. 655.

count for the profits received by the adventure or from the concern."

§ 12. **Liability of trustee for default of co-trustees.** Where there are two or more trustees, any one of them is not liable to the trust estate for losses resulting from the acts or defaults of his co-trustees, unless (and note carefully the exception) by his negligence the other trustees have been enabled to make a fraudulent use of the trust property. For example in Trutch v. Lamprell [16] there were two trustees who had disposed in a suitable manner of the trust property, receiving a check for the proceeds. One trustee handed this to the other, who proceeded to apply it to his own uses and then decamped. It was held that under the circumstances the entrusting of the proceeds in this fashion to one of the trustees constituted negligence on the part of the other, and that he was liable to make good the loss.

This brief statement of the duties and liabilities of trustees is intended to suggest only a few of the more important rules with reference to the matter. In all cases of doubt, competent legal advice should be secured by the trustee.

[16] 20 Beav. 116.

## CHAPTER XI.

## NEGOTIABLE INSTRUMENTS.

### Section 1. Negotiability.

**§ 1. Bills and notes are transferable obligations.** A bill of exchange or a promissory note is a kind of property which may be transferred by its owner to another. The quality of transferability is one of the qualities described when we say that bills and notes are negotiable.

**§ 2. Practical consequences of bills and notes being transferable.** The quality of transferability is of the greatest practical consequence, and is one of the peculiarities which makes bills and notes of value as instruments of trade and of credit. If X buys land of A, giving A his note for $1,000 in payment, and it transpires that A did not have the title so that X gets nothing, the failure of the consideration for which the note was given gives X a perfect defence against A's action on the note, because it would be unjust to allow A to enforce it. Suppose, however, A had sold the note to B, who had bought it in good faith, has X the same defence against B that he had against A? What was X's defence against A? Not that there was no note, for the intentional execution of the note by X is admitted, but that it was unjust for A to enforce the obligation. Certainly this objection cannot be raised to B's recovery. He owns the obligation of X, and, since he purchased it without notice of X's defence against A, there is no reason in law or in morals why B may not enforce the right against X he has lawfully acquired.

**§ 3. Same: Illustrations.** If X, instead of giving his note for the land, had made a simple promise to A to pay for it, the result would be different. Of course X has his defense against A. but, if A attempts to sell his right against X to B, who has no

notice of X's defense, what are B's rights? A common law obligation is ordinarily not transferable. Clearly then the attempted transfer vests in B no rights against X. Notwithstanding the sale, X's obligation to pay still runs to A. The only effect of the attempted transfer was to make B A's agent to collect the money, or to bring an action in A's name as plaintiff against X.[1] Since the obligation is still A's and its enforcement is by him as plaintiff, X's defense, that it is unjust for A to proceed against him, continues available, notwithstanding the attempted transfer, the only practical consequences of which were to give B the right to use A's name, and to keep the proceeds of the debt, if any were realized. See Chapter I, § 61.

That the difference between B's positions, in the two cases just discussed, depends upon the fact that the note is transferable or negotiable property, and that the common law debt is not, is made more clear by a case where X is induced, by fraud and deceit of A, to sell A his horse or his land, and thereafter A resells the property to B, who buys in good faith. Horses and land are transferable property, and the intentional transfer of X made A the owner of the property transferred. Since he has become owner through the fraud practiced on X, the courts compel him on obvious grounds of justice to return the property. But, if B has innocently purchased the property from A and thereby become the owner, there would be no justice in depriving B of his rights of ownership, and he is allowed to keep the property. The same result is reached in this case as in the case of the bill or note, for the reason that in both cases we are dealing with transferable property.

**§ 4. How bills and notes may be transferred.** Bills and notes are unique, then, in that they represent obligations to pay money which are as transferable as goods or land. They possess, however, another quality quite as peculiar as that of transferability, which determines the manner in which they may be transferred. The usual mode of transferring title to goods is by a

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[1] Almost everywhere today B might bring action in his own name as plaintiff. This result is obtained by statutes, which, although they change the procedure, do not clash with the rule stated in the text that choses in action are not transferable.

voluntary delivery, i. e., voluntary actual transfer of the goods, coupled with an intention to make the transferee the owner. The common mode of transferring land is by a voluntary delivery of a deed, with an intention to vest title in the grantee. A mere delivery or an involuntary change in the actual possession of the goods or of the deed, without an intention to pass title, would be ineffective. For example, A, with force and without X's consent, takes X's horse out of his possession—steals it. The physical act of taking possession is just as complete as if X had given his consent to it, but A does not become the owner because the necessary element of intention is absent. The same would be true if A stole from X a deed reciting a transfer of the land to A. But the obligation embodied in a bill or note differs quite as completely in the manner of its transfer from other kinds of transferable property as it does from the ordinary common law debt or obligation to pay money, in being transferable at all. A bill or note, if payable to bearer, or indorsed in blank, is transferable by a mere transfer of the instrument, whether voluntary or involuntary, intentional or unintentional.[2] Thus, if X owned such a note and A stole it from X, the title to the note would vest in A. Of course A would not be allowed to enforce the obligation, and would be compelled to return the note to X, but this is because of the manifest injustice of allowing him to keep it or assert his right upon it, not because he has not become the owner. In consequence, if A, the thief, sells the note to B, who knows nothing of the theft, B, having become the owner for value and without notice, may exercise the rights of ownership he has acquired from A, by holding and collecting it, or further negotiating it. Contrast this with a case where A steals X's horse, and then sells the horse to B, who is innocent of the theft. Here B, notwithstanding his innocence and the fact that he paid a full price to A, has no rights whatever in the horse. The reason is obvious: A by the theft of the horse did not become the owner; and the transfer of possession from X to A was involuntary and not coupled with an intention on X's part to make A owner.

[2] This is not true of bills and notes payable to order, unless they are indorsed. See § 64, below.

The horse never became the property of A, and B could not become the owner by a transfer from A, to whom the property did not belong.

§ 5. **Summary: Bills and notes are negotiable.** Bills of exchange and promissory notes, then, differ from common law obligations to pay money, in that bills and notes are transferable. They differ from other kinds of transferable property, as goods and land, in that they are transferable by mere delivery or even by involuntary change of possession. These two qualities are what give bills and notes the name of negotiable instruments. In their character as negotiable instruments they are like money, and it is their similarity to money which makes them of so much practical value in the business world.

## Section 2. Formal Requisites of Negotiable Instruments.

§ 6. **In general.** So far, we have spoken only of bills of exchange and promissory notes as negotiable instruments. But all bills and notes are not negotiable, and there are other mercantile instruments which are. What are the standards up to which an instrument must measure to be negotiable? The Negotiable Instruments Law [3] states generally the requisites as to form as follows:

Sec. 1. An instrument to be negotiable must conform to the following requirements:

1. It must be in writing and signed by the maker or drawer;
2. Must contain an unconditional promise or order to pay a sum certain in money;
3. Must be payable on demand, or at a fixed or determinable future time;
4. Must be payable to order or to bearer; and
5. Where the instrument is addressed to a drawee, he must

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[3] "The Negotiable Instruments Law" is a statute which was prepared by the Commissioners on Uniform State Laws to codify and make uniform the law of negotiable instruments throughout the United States. For the most part it codifies the pre-existing law. It has been adopted without important amendment in fifty-two jurisdictions, including states, territories, provinces, and the District of Columbia. For these two reasons it is cited and discussed in this article as an

be named or otherwise indicated therein with reasonable certainty.

**§ 7. Ordinary forms of negotiable instruments.** The typical form of a promissory note is this:

"Chicago, December 20, 1937.

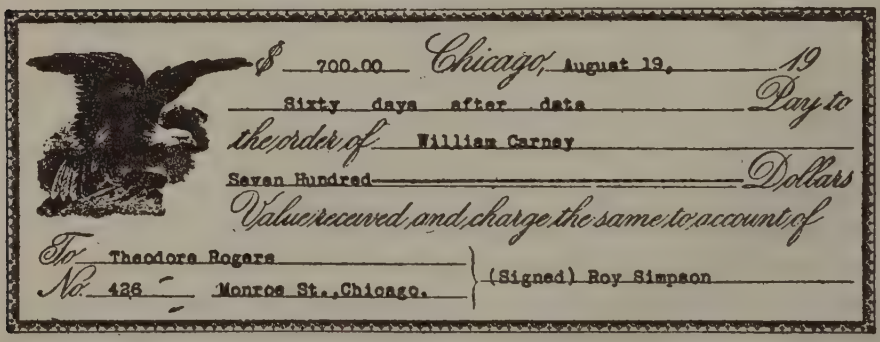
Three months after date I promise to pay to John Jones, or order [or, to the order of John Jones], four hundred dollars [with interest may be added if desired].

Jacob Smith."

Other forms are found below.

A typical form of a bill of exchange is:

BILL OF EXCHANGE OR DRAFT.


$ 700.00 Chicago, August 19, 19
Sixty days after date Pay to
the order of William Carney
Seven Hundred Dollars
Value received, and charge the same to account of
To Theodore Rogers
No. 426 Monroe St., Chicago.
(Signed) Roy Simpson

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authoritative statement of the law of Negotiable Instruments. The following is a list of the jurisdictions which have adopted it

Alabama (1907)
Alaska (1913)
Arizona (1901)
Arkansas (1913)
California (1917)
Colorado (1897)
Connecticut (1897)
Delaware (1911)
District of Columbia (1899)
Florida (1897)
Georgia (1924)
Hawaii (1907)
Idaho (1903)
Illinois (1907)
Indiana (1913)
Iowa (1902)
Kansas (1905)
Kentucky (1904)
Louisiana (1904)
Maine (1917)
Maryland (1898)
Massachusetts (1898)
Michigan (1905)
Minnesota (1913)
Missouri (1905)
Montana (1903)
Nebraska (1905)
New Hampshire (1910)
New Jersey (1902)
Nevada (1907)
New Mexico (1907)
New York (1897)
North Carolina (1899)
North Dakota (1899)
Ohio (1902)
Oklahoma (1909)
Oregon (1899)
Pennsylvania (1901)
Philippine Islands (1911)
Rhode Island (1899)
South Carolina (1914)
South Dakota (1913)
Tennessee (1899)
Texas (1919)
Utah (1899)
Vermont (1913)
Virginia (1897-8)
Washington (1899)
West Virginia (1907)
Wisconsin (1899)
Wyoming (1905)
Porto Rico (1930)

A check is like a bill, except that it is directed to a bank or banker, and is not accepted.

In the note above, Jacob Smith is maker and John Jones is payee. In the bill, Roy Simpson is drawer, Theodore Rogers is drawee and acceptor, and William Carney is payee. In a check a bank is drawee, and there is no acceptor. The drawer and payee are as in the bill.

JUDGMENT NOTE.

October 5, 19

One year after date, for

Value Received, I Promise to pay to the order of

John C. Davis the sum of

One Thousand Dollars,

at the Continental-Commercial National Bank of Chicago with Interest thereon at the rate of five per cent per annum, payable semi- annually.

This Note is secured by a Chattel Mortgage of even date herewith, on personal property in the city of Chicago, and is to bear interest at the rate of seven per cent per annum after maturity.

And to secure the payment of said amount I hereby authorize, irrevocably, any attorney of any Court of Record to appear for me in such Court, in term time or vacation, after this note is due, and confess a judgment, without process, in favor of the holder of this Note, for such amount as may appear to be unpaid thereon, together with costs and fifty dollars attorney's fees, and to waive and release all errors which may intervene in any such proceedings and consent to immediate execution upon such judgment, hereby ratifying and confirming all that my said attorney may do by virtue hereof.

(Signed) William Stone

JUDGMENT NOTE WITH COLLATERAL SECURITY.

$1,000.00

*Chicago, April 4, 1938.*

*Two years* after date, for value received, *I* promise to pay to the Order of *William Pollock* the sum of *One Thousand Dollars*, at *the Commercial Bank, Chicago*, with interest at the rate of *six* per cent per annum *payable semi-annually* after *date* having deposited with said *William Pollock* as collateral security. *Twenty shares of the capital stock of Swift & Company, Chicago*, which *I* hereby give the said *William Pollock, his* agent or assignee, authority to sell, or any part thereof, on the maturity of this Note, or at any time thereafter, or before in the event of said securities depreciating in value, in the opinion of said *William Pollock*, at public or private sale, at the discretion of said *William Pollock* or *his* assignee, without advertising the same, or demanding payment, or giving *me*

any notice, and to apply so much of the proceeds thereof to the payment of this Note as may be necessary to pay the same, with all interest due thereon, and also to the payment of all expenses attending the sale of the said *stock* including Attorney's fees; and, in case the proceeds of the sale of the said *stock* shall not cover the principal, interest, and expenses, *I* promise to pay the deficiency forthwith, after such sale. And at any sale of said collaterals, or any part thereof, made by virtue hereof, it shall be optional with the legal owner or holder of this Note to bid for and purchase said collaterals or any part thereof.

*(Signed) John Jones*

*Due April 4, 1940.*

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KNOW ALL MEN BY THESE PRESENTS, That *I*, the Subscriber *am* justly indebted to *William Pollock* upon the above written Promissory Note, bearing even date herewith, for the sum of *One Thousand* Dollars, with interest at the rate of *six* per cent per annum after *date* and due *two years* after date.

NOW, THEREFORE, IN CONSIDERATION OF THE PREMISES, *I* do hereby make, constitute, and appoint.....or any Attorney of any Court of Record, to be *my* true and lawful Attorney, irrevocably, for *me*, and in *my* name, place, and stead, to appear in any Court of Record in term time or in vacation, in any of the States or Territories of the United States, or elsewhere, at any time after said Note becomes due, to waive the service of process, and confess a judgment in favor of the said *William Pollock* or *his* assigns or assignees, upon the said Note, for the amount thereof, and interest thereon to the day of the entry of the judgment, together with costs, and an agreement therein that no writ of error or appeal shall be prosecuted upon the judgment entered by virtue thereof, nor any bill in equity filed to interfere in any manner with the operation of said judgment, and to release all errors that may intervene in the entering up of said judgment, or issuing the execution thereon; and, also, to waive all benefit or advantages to which *I* may be entitled by virtue of any Homestead or Exemption Law now or thereafter in force, in this or any State or Territory, where judgment may be entered by virtue hereof, hereby ratifying and confirming all that *my* said Attorney may do by virtue hereof.

WITNESS *my* hand and seal, this *fourth* day of *April* A. D., *1938*.

IN PRESENCE OF

*(Signed) John Jones* [SEAL]

*(Signed) Sarah Williams*
*(Signed) Kenneth Jones.*

**§ 8. Materials for writing. Signature.** The writing may be executed by any instrument or tool sufficient for the purpose. Pen and ink are of course ordinarily used, but a writing in pencil is permissible, although not advisable. An instrument, every part of which, including the signature, is typewritten, or is printed, or one on which the signature is stamped, is perfectly valid. The practical disadvantage of typewritten and penciled instruments and signatures is their easy obliteration and alteration. Printed and stamped signatures, while not open to this objection, are more difficult to prove than a signature in the handwriting of the signer.

**§ 9. Note must contain a promise.** The ordinary form of promissory note reads "I promise to pay," etc., and thus complies in express terms with this requirement.

**§ 10. Bill of exchange must contain an order.** This requirement is also expressly met in the regular form of bill or draft, which in imperative terms directs the person upon whom the bill is drawn to "Pay to A" the sum specified.

**§ 11. Promise or order must be unconditional.** An instrument which carries on its face an obligation, upon which the money will not be payable unless some specified event happens, would be of little value in business before the condition happened, because it might never happen, and even after the happening of the condition, the fact the promise had thus become absolute would not be disclosed on the paper. In consequence, although such an instrument witnesses a perfectly valid contract, it is not negotiable.

Since the paper must be unconditional on its face, a promise to pay if a certain event has already happened before the note is delivered, is not a promissory note, although the specified event had really occurred before the making of the promise. Nor will the subsequent happening of a named contingency make the instrument a bill or note after that time. On its face the instrument is still conditional. "An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect."[4]

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[4] Neg. Inst. Law, sec. 4.

**§ 12. Promise or order to pay out of particular fund is conditional.** If A sells B a mine, and takes in payment a written promise by B to pay "out of the proceeds" of the ore to be mined, such promise is clearly a contingent obligation and not a note, because there may never be any proceeds. So, if an employee draws an order on his employer, directing a payment to be made out of the salary to become due the employee, the order is not a bill. The salary may never become due.

But if a depositor, having two accounts with a bank, draws a check on the bank, "Please pay A, or order, $100 and charge account No. 1," it is a negotiable instrument. The order is not in terms conditional upon the existence of money in the bank to the credit of the depositor, but is an imperative direction to the bank to pay A, or order, $100. The words "charge account No. 1," are simply an indication to the bank of the account to which the check is to be charged after it is paid. The fact that the bank might not pay the check, if the depositor's account was not good, does not make the order conditional on its face, and the face of the instrument is controlling in determining its negotiability.

**§ 13. Statement of consideration does not make instrument conditional.** The statement of the consideration for which the instrument was given does not make it conditional upon the consideration stated having been performed. Thus in Mabie v. Johnson,[5] in consideration of a machine and a warranty thereof, of which warranty there was in fact a breach when the note was delivered, Johnson gave his note as follows:

"Guilford, Nov. 29, 1870.

For one Hinckley knitting machine warranted I promise to pay J. H. Wells or bearer $30 one year from date."

Part of the consideration was the warranty, which was not fulfilled, yet this fact did not make the note conditional on its face, and the instrument was held a promissory note. The result would of course have been different, if the paper had read, "For one Hinckley knitting machine, if as warranted, I promise," etc.

[5] 8 Hun. 309 (N. Y.

Nor does the statement of a consideration to be performed after the note is delivered, make it conditional upon the consideration being performed. Again there is nothing in the words of the note making it conditional. Upon this ground the following instrument was held a promissory note.[6]

$300. "Chicago, Mar. 5, 1887.
On July 1, 1887, we promise to pay D. Dalziel, or order, the sum of three hundred dollars, for the privilege of one framed advertising sign, size — x — inches, one end of each of one hundred and fifty-nine street cars of the North Chicago City Railway Co., for a term of three months, from May 15, 1887.
Siegel, Cooper & Co."

The most striking example of the rule that to deprive a negotiable instrument of its character as such, the condition must appear within its four corners, is the case of Jury v. Barker,[7] in which a note in this form—

"London, 29th Oct., 1857.
I promise to pay to Mr. J. C. Saunders or his order, at three months after date, the sum of one hundred pounds, as per memorandum of agreement. Henry John Barker.
Payable at 105 Upper Thames Street, London."

was held a promissory note. The effect of the words "as per memorandum of agreement" will not charge any purchaser of the note with notice of the agreement referred to or subject him to any defenses based upon its provisions.

The N. I. L.[8] codifies the rules applied in these cases in these words:

Sec. 3. An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with:

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or

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[6] Siegel v. Chicago Bank, 131 Ill. 569.

[7] Ellis, B. & E. 459.

[8] The Negotiable Instruments Law will be abbreviated "N. I. L." in this chapter.

2. A statement of the transaction which gives rise to the instrument.

But an order or promise to pay out of a particular fund is not unconditional.

**§ 14. Promise or order must be certain in amount payable at maturity.** The defendant's written promise to pay plaintiffs, or order, 13 pounds on demand for value received with interest at 5 per cent "and all fines according to rule" is not a promissory note, because of the uncertainty as to the sum due on the instrument. A stipulation for interest at a given rate, however, does not make the sum payable uncertain; for, taking the data on the face of the note, i. e., the date the principal sum is due, its amount, and the rate of interest, the amount of interest payable at maturity is a mere matter of computation. The same result follows if the promise is simply to pay interest, without specifying a rate, for the legal rate is then payable. It is true that if the instrument is not paid at maturity, when, if ever, it will be paid is uncertain, and that in consequence the amount of interest finally payable can not be ascertained from the instrument. This, however, is immaterial for the canon of certainty refers to the maturity of the instrument. For the same reason it is held that bills and notes specifying different rates of interest, before and after maturity, are certain in amount. For example the following is a valid note:[9]

$100. "Good Thunder, July 24, 1882.

For value received on or before the first day of January, 1884, I, or we, or either of us, promise to pay to the order of D. M. Osborne and Co. the sum of one hundred dollars, at the office of Gebhard and Moore, in Mankato, with interest at ten per cent per annum from date until paid; seven, if paid when due.

W. J. B. Crane."

**§ 15. Costs of collection and attorney's fees.** On the same principle, a stipulation to pay in addition to principal and interest, costs of collection and attorney's fees, if the bill or note

[9] Smith v. Crane, 33 Minn. 144.

is not paid at maturity, does not affect its negotiability. The sum payable at maturity is certain.

**§ 16. Instruments payable with exchange.** An exception to the requirement of certainty is based upon the commercial usage of making bills and notes payable at one place, with exchange on another. This usage is recognized, although its recognition is technically a violation of the canon of certainty. Thus a note payable in St. Paul, Minn., "with current exchange on New York City" is good.

**§ 17. Instruments payable in instalments.** A bill or note payable in instalments, for example, $100 in ten payments of $10 each every 30 days, is unquestionably certain as to amount. So also is such an instrument which further provides that, in case of a default in the payment of any instalment, the whole amount shall at once become due. Whether such a stipulation for accelerating payment makes the instrument uncertain as to time of payment will be considered below. The N. I. L. thus states the law:

Sec. 2. The sum payable is a sum certain within the meaning of this act, although it is to be paid:

1. With interest; or
2. By stated instalments; or
3. By stated instalments, with a provision that upon default in payment of any instalment or of interest, the whole shall become due; or
4. With exchange, whether at a fixed rate or at the current rate; or
5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity.

**§ 18. Promise or order must be certain as to the time of payment.** There is a literal compliance with this rule in the ordinary bill or note payable "on Jan. 1, 1938," or "10 days after date." The familiar case of negotiable instruments payable on demand is an exception based on business usage. Notwithstanding the uncertainty of the time of death, a promise in this form: "Thirty days after death, I promise to pay Cornelius Carnwright $1500, with interest," is held a promissory note. So also, an instrument payable at the maker's option on or be-

fore a day named, or "within one year after date" is a promissory note. Further, a note for a specified sum payable in instalments, the size of which depends upon the maker's option, is negotiable paper.

A negotiable instrument must be (a) payable on demand, or (b) payable not later than a particular day fixed either in the instrument or with reference to the happening of an event certain to happen, or (c) payable after demand at a date fixed as in (b).

**§ 19. Instruments payable on demand.** "An instrument is payable on demand: (1) Where it is expressed to be payable on demand, or at sight, or on presentation; or (2) in which no time of payment is expressed." [10]

Thus, a bill or note is sufficient which specifies no day of payment, because by construction it is payable on demand. The N. I. L. provides:

Sec. 4. An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable:

(1) At a fixed period after date or sight; or

(2) On or before a fixed or determinable future time specified therein; or

(3) On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

**§ 20. Particular kind of money.** The N. I. L.[11] provides that a bill or note may "designate a particular kind of current money in which payment is to be made." Such provisions in contracts or bills and notes are now prohibited by the statutes of the United States.[11a]

**§ 21. Bill or note must order or promise payment of money only.** A promise to pay A or order $100, and to deliver him or order a horse on Jan. 1 is not a note. Nor is a promise either to pay A or order $100, or to deliver a horse on Jan. 1, at the promisor's option, a promissory note. But a promise to pay A or order either $100, or, at his option, to deliver him a horse, is

[10] Neg. Inst. Law, sec. 7.

[11] Sec. 6, subd. 5.

[11a] U. S. Code, Title 31, Sec. 463.

a promissory note. In the first case there is a promise to do something in addition to the payment of money. In the second, the promise to pay money is conditional upon the promisor's exercising his option. In the third, the promise to pay money is absolute, and, in case the holder elects to take money, the promisor is bound to deliver nothing in addition.

It seems clear that recitals in an instrument, that collateral security for it has been given and authorizing the sale of the collateral, or authorizing the entry of a judgment by default against the maker, in case of non-payment, or waiving the benefit of exemption laws, do not encroach upon the rule just stated, or any of the other rules we have discussed. The N. I. L. says:

Sec. 5. An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision, which:

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or

2. Authorizes a confession of judgment if the instrument be not paid at maturity; or

3. Waives the benefit of any law intended for the advantage or protection of the obligor; or

4. Gives the holder an election to require something to be done in lieu of payment of money.

But nothing in this section shall validate any provision or stipulation otherwise illegal.

**§ 22. Certainty of parties: Requisite parties.** It is impossible to conceive of a promissory note without a maker, i. e., a promisor, and a payee to whom the promise runs; or of a bill of exchange without a drawer who writes the order, a drawee to whom the order is directed, and a payee in whose favor it is drawn. A note presupposes two parties and a bill three. However, the formal validity of a bill or note is not affected by the fact that one person is designated upon its face in more than one of the several capacities. Nothing is more common in business than making a note payable to the maker's order. In such a case, of course, the payee could not bring an action against himself as maker. But, in respect to form, the note is valid, and,

when it is transferred to a second person, the instrument becomes an enforceable obligation. So, in the case of a bill drawn payable to the drawer. Although no obligation arises on the instrument in favor of the payee against himself as drawer, upon a transfer of the instrument to a third person the drawer becomes liable as such to the transferee. In like manner the same person may be designated as drawee and payee in the instrument. Here again the drawee's acceptance, or promise to pay, obviously puts him under no duty to himself as payee. But, upon a transfer to a third person, the acceptance becomes operative.

The N. I. L.[12] provides that a negotiable instrument "may be drawn payable to the order of: (1) A payee who is not maker, drawer or drawee; or (2) the drawer or maker; or (3) the drawee."

§ 23. **Same (continued).** Upon the same principle, an instrument in which the same person is named as drawer, payee, and drawee, is sufficient in point of form, but is of course inoperative until transferred.

Whether such an instrument is a bill of exchange or a promissory note is a different question. Although in form a bill, it seems that it is in substance a promissory note.

The N. I. L.[13] provides:

"Where the instrument is so ambiguous that there is a doubt whether it is a bill or note, the holder may treat it as either at his election." Again, the Law says:[14]

"When, in a bill, drawer and drawee are the same person . . . the holder may treat the instrument at his option either as a bill of exchange or a promissory note."

§ 24. **Certainty of parties: Maker or drawer.** The person who is the maker of a note or drawer of a bill is indicated by his signature thereto. The instrument "must be signed by the maker or drawer."[15] If there is no signature by the maker or drawer, the instrument is not a bill or note.

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[12] Sec. 8.

[13] Neg. Inst. Law, sec. 17, subd. 5.

[14] Neg. Inst. Law, sec. 130.

[15] Neg. Inst. Law, sec. 1.

Any written symbol or mark is a sufficient signature, for example "1, 2, 8," provided the maker intended to bind himself by the figures as his signature. It follows that "one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name." [16]

But, "no person is liable on the instrument whose signature does not appear thereon." [17] Thus Rowlestone, although Walker was admittedly acting as agent for him to the knowledge of Siffkin, was not liable on the following note:

"Two months after date, I promise to pay J. Siffkin or order 300 pounds for value received. (Sgd.) Thos. Walker."

And conversely, if Walker were sued on the instrument, his agency would be no defence because he has made it his note by signing it as maker.

§ 25. **Same: Signatures of agents.** Let us suppose, however, that Walker had added the word "agent" after his signature, would this discharge Walker from liability on the note? Would it make his principal, Rowlestone, liable thereon? The second question we may dismiss at once with a negative. Under no circumstances could Rowlestone be held on a note which had not been signed in his name, either by him in person or by his authorized agent. The first question depends for its answer upon whether or not the holder of the instrument knew that Walker was acting as agent and did not intend to bind himself. If the holder did know this, then, according to the later authorities, the signature, "Walker, agent," would not bind Walker. But if the holder did not know of these circumstances, Walker would be bound. The mere addition of the word "agent" after Walker's signature, however, would not by itself notify the holder of Walker's intention not to be bound. The word is treated by the courts as of no more effect than a word or phrase added by way of more complete description of the signer, as for example, "of Madison, Wis.," "Instructor in X College," "Conductor on X Railroad," etc. In Keidan v. Winegar [18] the plain-

[16] Neg. Inst. Law, sec. 18.
[17] Neg. Inst. Law, sec. 18.
[18] 95 Mich. 431.

tiff took a note from the defendant for a debt due to plaintiff from defendant's principal, both parties treating the obligation as that of the principal. The note was in this form:

"Dec. 22, 1887. 90 days after date, I promise to pay to the order of Geo. Keidan $336.96 at the Old Nat. Bank of Grand Rapids, Mich., value received, with interest at the rate of 6% per annum until paid. (Sgd.) W. G. Winegar, Agt."

It was held that Winegar was not liable.

In First National Bank v. Wallis,[19] however, a note in the form below was held to be the note of Wallis and Smith, notwithstanding the form of the signature and the marginal writing, it not appearing that the plaintiff took the instrument knowing that Wallis and Smith intended to bind the corporation and not themselves.

"Wallis Iron Works.
"Jan. 20, 1893.

"Three months after date, we promise to pay to the order of H. Stentzer & Co. $100 at the 1st National Bank of Jersey City, value received.

"Wm. T. Wallis, President.
"George T. Smith, Treasurer."

The words "President" and "Treasurer" were considered as mere words of description or identification. The "Wallis Iron Works" in the margin was not considered significant, because any one might use one of the Iron Company's blank forms.

§ 26. **Same (continued).** The questions arising upon irregular forms of signatures by agents are difficult, the decisions are conflicting, and the only safe course is to use an unquestioned mode of signature. Examples of signatures which undoubtedly bind the principal X, whether individual or corporation, and not the agent, A, are: "X by A;" "A for X;" "by authority of X, A;" "X, by A, agent;" "X, by A, president;" etc. Of course the agent may sign his principal's name without adding his name.

If the agent signs in his own name simply, we have seen that he, and he only, is bound. But if the agent signs for his prin-

[19] 150 N. Y. 455.

cipal in proper form, the principal is the only person who can be held on the instrument. If the agent signs for his principal in proper form to bind him, but is not authorized to sign, the principal is not bound. Is the agent liable? Obviously he can not be held on the bill or note because it does not bear his signature as maker. He is, however, liable to the person he has misled for the resulting damage, if any, in an action upon his warranty of authority. The provisions of the N. I. L. are as follows:

Sec. 19. The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.

Sec. 20. Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.

These sections have not changed the law as above set forth, but merely codify it.

**§ 27. Certainty of parties: Payee.** "Where the instrument is payable to order, the payee must be named or otherwise indicated therein with reasonable certainty."[20]

A bill or note payable to "X, cashier" is presumably payable, not to X, but to the bank of which X is cashier. Business usage makes the words "X, cashier" mean the bank of which he is an officer. The same rule of interpretation is applied to a note payable to any fiscal officer of a bank or corporation.

**§ 28. Fictitious payees.** Suppose, however, the name used in a note is not intended by the maker to designate any person bearing that name, or any other person, but that the maker intends to indorse and issue the note himself. Such a note might well be treated as payable to himself by the fictitious name, but the law seems to be that such a note, when indorsed by the

[20] Neg. Inst. Law. sec. 8.

maker, is treated as payable to bearer. The rule is thus stated in Sec. 9, subd. 3 of the N. I. L.:

"The instrument is payable to bearer . . . when it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable."

The reason for the rule very clearly appears to be that if the instrument were treated as payable to order, its indorsement and transfer by the maker, who is not named as payee, would not pass title to the instrument, and the transferee would get no rights on the instrument. Thus the maker by transferring the note would be perpetrating a fraud upon the transferee. To avoid this result the instrument is treated as payable to bearer.

**§ 29. Alternative payees.** Before the enactment of the Negotiable Instruments Law it was held that an instrument payable to "A or B, or order" was not a bill or note, an uncertainty as to the payee existing because of the option of the maker or acceptor to pay either one or the other. But the N. I. L. provides that a bill or note may be payable to "One or some of several payees."[21] Of course, there would be no objection to an instrument payable to several jointly, as to A, B, and C, because here the payee of the obligation is the group as a unit.[22]

**§ 30. Successive holders of office as payees.** An instrument payable to "A, executor of B's estate and his successors," or to "A, treasurer of the B corporation and his successors" is negotiable. Although it may be uncertain who will be the holder of the office when the instrument becomes payable, there can not be more than one person at any given time who is payee of the instrument, and the paper describes him with reasonable certainty.

**§ 31. Certainty of parties: Drawee.** A bill is an order "addressed by one person to another."[23] "A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession."[24] "Where the instrument is addressed to a drawee, he

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[21] Sec. 8, subd. 5.
[22] Sec. 8, subd. 4.
[23] Neg. Inst. Law, sec. 126.
[24] Neg. Inst. Law, sec. 128.

must be named or otherwise indicated therein with reasonable certainty."[25]

**§ 32. Negotiable instrument must be payable to order or bearer.** Even if an instrument conforms to all of the foregoing requirements, it is not negotiable unless it is payable to order or to bearer.

**§ 33. Order instruments.** "An instrument is payable to order when it is drawn payable to the order of a specified person or to him or his order."[26]

**§ 34. Bearer instruments.** "The instrument is payable to bearer: (1) When it is expressed to be so payable; or (2) when it is payable to a person named therein or bearer; or . . . (4) when the name of the payee does not purport to be the name of any person."[27]

Thus, by the words of the N. I. L., an instrument reading "Pay to bearer" or "Pay to A, or bearer" is negotiable. But a note payable to "the bearer, A" is not. In such a case the word "bearer" is used in addition to the payee's name further to describe and identify him.

The use of the word bearer is not necessary. Any word or phrase of equivalent significance is sufficient. Thus a note payable to "M. Owens, or holder" is payable to bearer.

**§ 35. Same: Payee not a person.** If the designation of the payee does not purport to designate an individual, the instrument is payable to bearer. Checks payable to "the order of cash" are familiar examples of this kind of bearer paper.

**§ 36. Date of instrument.** The only purpose of a date is to fix the time of payment. In an instrument payable on a specified day, e. g., Jan. 1, 1947, the date fulfills no office; but in a note payable after date, e. g., "30 days after date," the date written on the instrument fixes the day of payment. Since the only purpose of the date is that indicated, the maker may regulate the day of payment by dating the instrument "back" or "ahead." Thus, if on Jan. 1, 1947, he issued his note dated "Dec. 1, 1946," payable "three months after date," it would

[25] Neg. Inst. Law, sec. 1, subd. 5.

[26] Neg. Inst. Law, sec. 8.

[27] Neg. Inst. Law, sec. 9.

be payable March 1, and not April 1, 1947. If the same instrument were dated Feb. 2, 1947, it would be payable May 2, 1947; and the instrument in such a case would be the valid obligation of the maker or drawer from the day of its issue on Jan. 1, notwithstanding it bore date a month later. If any instrument payable "three months after date" is issued undated, it is payable three months after the day of its issue. If such an instrument is issued on Jan. 1, 1947, but is dated by mistake "Jan. 1, 1946," the instrument is nevertheless payable three months after the day of its issue, i. e., April 1, 1947.

**§ 37. Value received.** The phrase "value received," or "for value received," so frequently inserted in promissory notes is not essential, and adds nothing to the force and effect of the instrument.[28]

**§ 38. Bills and notes defined.** A recapitulation of the formal requisites of a bill and of a note in definitions would give us the following:

"A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order, or to bearer." [29]

"A negotiable promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to order, or to bearer." [30]

### Section 3. Inception of Instrument as an Obligation.

**§ 39. Intentional signing.** An instrument in every formal respect a completed promissory note or bill of exchange is of no legal effect, unless the maker or drawer signed the paper intending to sign a bill or note. Thus, in Walker v. Ebert,[31] the defendant, a German unable to read and write English, was induced by the payees to sign an instrument, in form a promissory

[28] Neg. Inst. Law, sec. 6 (2).
[29] N. I. L., sec. 126
[30] N. I. L., sec. 184
[31] 29 Wis. 194

note, in reliance upon their false statements that it was a contract appointing the defendant agent to sell a patent right. The payees sold the instrument to the plaintiff, who knew nothing of the fraud. It was held that the defendant was not liable. The instrument, although complete in form, was not the defendant's note and the plaintiff acquired nothing by his purchase of the paper.

§ 40. **Signing without reading: Carelessness.** In such a case, however, the defendant may have been so careless in affixing his signature to a paper, of the contents of which he is ignorant, that it would be unjust to allow him to escape liability to the innocent purchaser. When this is true, the courts refuse to allow the apparent maker the defence that he did not intentionally sign the note in question. Thus, in Chapman v. Rose,[32] the defendant signed a document in form a promissory note for $270 payable to Miller, or bearer. The defendant, misled by the false statements of Miller, supposed he was signing the duplicate of an order for farm machinery, the original of which he had delivered to Miller a few moments before. The paper having passed into the hands of an innocent purchaser, it was held that the defendant was liable upon it. The court deemed the conduct of the defendant so careless, in signing without reading when he might have done so, that it was unjust to allow him to set up the defence that he did not intentionally sign a note.

§ 41. **Intentional signing induced by fraud.** The class of cases we have been discussing should be carefully distinguished from cases where the maker intended to make and sign the note upon which he is sued, but would not have intended to sign had he known the true facts. In Miller v. Finley,[33] the defendant was induced to sign a note for the price of a worthless patent right, which was fraudulently represented by the payee to be a valuable invention. The payee sold the note to the plaintiff, who knew nothing of the fraud practiced upon the defendant. It was held that the defendant was liable. His intention to sign the note in dispute was unquestioned. He would not have signed

[32] 56 N. Y. 137.
[33] 26 Mich 249.

had he known that the patent was valueless, but he did not know that fact and in consequence intended to sign. Of course, in such a case the payee who practiced the fraud could not recover upon the instrument, for the reason that it would be unjust to allow him to enforce the obligation and retain the proceeds, but not because the note was not a valid negotiable instrument.

§ 42. **"Delivery."** In addition to the intentional signing of the instrument, something further is necessary to give it an inception as an obligation. In order that the bill or note may have legal effect, it must have passed out of the possession of the maker or drawer. A note found among the maker's papers after his death imposes no obligation upon him or his estate. But, if in any manner a completed instrument passes out of the possession of the signer into that of the payee or bearer, the instrument imposes a legal obligation on the maker or drawer. The mere involuntary parting with possession gives the instrument its inception as a bill or note. The inception of the instrument may thus result from a theft or forcible taking by the payee or bearer from the signer, or from fraud or duress practiced by the former upon the latter, as well as from an intentional delivery by the maker or drawer. But only innocent holders could recover on it.

§ 43. **Position of innocent purchaser of the instrument.** If the thief, or fraudulent payee, or the payee who holds the note subject to a condition, sells the instrument to a purchaser who knows nothing of the wrong of the payee, the purchaser is entitled to recover upon the instrument from the maker. Thus, in Shipley v. Carroll[34] it appeared that the defendant made and signed the note in suit as a matter of amusement, with no design of delivering it to the payee, and that the payee stole the note from the maker and sold it to the plaintiff, who had no notice of the theft. It was held that the note was an obligation of the maker, and that the plaintiff who bought the note innocently was guilty of no wrong, or breach of duty, or injustice in enforcing it. In Clark v. Johnson,[35] the same rule was applied. In that case the maker, who had signed a note complete in form,

[34] 45 Ill. 285.
[35] 64 Ill. 296.

was about to insert a condition in it before delivery, when the payee snatched the note from the maker's hands, made off with it, and sold it to the plaintiff, an innocent purchaser. The maker was held liable. The same result has been reached under the N. I. L.[36]

These cases show what care must be taken in transactions involving the issuing of negotiable instruments.

§ 44. **Incomplete instruments.** If a person signs a promissory note or bill of exchange incomplete in some particular, as, for example, the amount or date of payment; or a blank printed form for a note or bill; or puts his signature on a piece of paper wholly blank, and delivers it to another with authority to fill in the blank or blanks so as to make a complete instrument, the signer is bound on the bill or note if the blanks are filled in in accordance with his authority by any holder, exactly as he would have been had he himself filled up the blanks before delivery. Furthermore, the signer of the incomplete instrument is assumed to have authorized any holder to fill in the blanks in any manner he desires, and, in an action against the signer upon the instrument, he must prove that the authority he gave has actually been exceeded if that is the fact. In the words of the N. I. L.:[37]

"When the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper, delivered by the person making the signature in order that the paper may be converted into a negotiable instrument, operates as a prima facie authority to fill it up for any amount. In order, however, that any such instrument, when completed, may be enforced . . . it must be filled up strictly in accordance with the authority given and within a reasonable time."

For example, in Cruchley v. Clarance,[38] the defendant drew a bill on M, payable "to the order of ————," and delivered it

[36] Greeser v. Sugarman, 76 N. Y. Supp. 922; Massachusetts Bank v. Snow, 187 Mass. 159.

[37] Sec. 14.

[38] 2 Maule & S. 90

to Vashion, who transferred it to the plantiff. The plaintiff inserted his own name in the instrument as payee and sued the defendant. It was held that the plaintiff must be assumed to have authority to fill in the blank as he saw fit, the defendant not having shown that he had limited Vashion's authority in respect to the filling of the blank; and the plaintiff prevailed. An illustration of the other aspect of this rule is Awde v. Dixon,[39] In that case the defendant signed a note, blank as to date and payee, and delivered it to his brother, authorizing him to fill the blanks and negotiate it after one Robinson had signed the note as co-maker with the defendant. Without securing Robinson's signature, the brother took the note to the plaintiff, who bought it in good faith and filled in the date and his own name as payee. It was held that the plaintiff could not recover. It appearing that the defendant had authorized the filling of the blanks, only in the event of Robinson's signing, the presumption of authority arising from possession of the note with unfilled blanks was rebutted.

§ 45. **Innocent purchaser of instrument completed in excess of authority.** Suppose, however, that the plaintiff had purchased the notes from the brother, after he had, in breach of his authority, filled the blanks; and that the plaintiff had no knowledge that the note was not complete when signed by defendant. In such a case the plaintiff could recover. The violation of his authority by the defendant's agent would be no reason for defeating a purchaser in good faith of the completed note. The N. I. L.[40] states the rule as follows:

"But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time."

§ 46. **Incomplete instruments not intentionally delivered as such.** Up to this point, we have been dealing with blank pieces of paper and incomplete notes and bills, which have been signed

[39] 6 Exch. 869
[40] Sec. 14

and delivered by the signers "in order that the paper may be converted into a negotiable instrument." If the signer of a blank sheet of paper intended it for some other purpose, or if the signer of an incomplete note never intrusted any one with the paper for that purpose, the signer is not chargeable upon the paper, even though after its completion it was transferred to an innocent purchaser. In Caulkins v. Whistler,[41] the defendant was employed by Smith as agent to sell farm machinery. At Smith's request defendant signed his name upon a blank piece of paper, which Smith was to send to the manufacturers of the machinery, so that they might know defendant's signature upon the orders he sent in. The note upon which the action was brought was printed over defendant's signature. The defendant was not liable. In another case, the defendant wrote his signature as acceptor on several printed blank forms for bills of exchange, and left them in a drawer of his desk. The blanks were stolen, filled up, and negotiated to the plaintiff, an innocent purchaser. It was held the plaintiff could not recover. The N. I. L.[42] thus codifies the result of these cases:

"Where an incomplete instrument has not been delivered, it will not, if completed and negotiated without authority, be a valid contract in the hands of any holder."

**§ 47. Presumption of delivery.** That a negotiable instrument has not had a valid inception is a fact which must be proved in the first instance by the defendant who is sued upon it. In other words, from the mere production in court by the plaintiff of a completed instrument signed by the defendant, it is inferred, as a matter of fact, that the instrument produced is the obligation of the signer.

"Where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved."[43]

**§ 48. Consideration.** The N. I. L. declares (Sec. 25) that "any consideration sufficient to support a simple contract" may

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[41] 29 Ia. 495.

[42] Sec. 15.

[43] Neg. Inst. Law, sec. 16.

be consideration for a negotiable instrument. See Contracts, Chapter I, Section 3.

### Section 4. Acceptance of Bills.

**§ 49. Drawee not bound unless he accepts.** If A, complying with the requirements as to form, draws a bill of exchange on B, payable to C, and delivers it to the payee, the act of A in drawing and delivering the instrument imposes no liability on the drawee, B. If B is not indebted to A this is obvious. If B is indebted to A, B's duty to pay runs to A, and A cannot impose on B a new duty, i. e., one to pay to a third person, C.

It is the formal act of acceptance of a bill by the drawee from which his obligation to pay arises.

**§ 50. Form of acceptance. Oral acceptance.** "The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee."[45] The normal and proper mode of acceptance is one written on the bill itself. An acceptance written on the bill, however, does not impose an obligation on the acceptor until he has re-delivered the bill to the holder, or notified him of the fact of acceptance. " 'Acceptance' means an acceptance completed by delivery or notification."[46]

An oral acceptance is not binding under the statute.

**§ 51. Virtual acceptance.** An acceptance presupposes an existing bill, but the prospective drawee may make a contract with the drawer to accept a bill to be drawn. Such a contract, whether oral or in writing, is perfectly valid. In fact, that is the very contract which a bank makes with its customers upon receiving their deposits, i. e., to pay their checks. But it is a contract which gives the payee or holder no rights, because he is not a party to it, although of course the drawer to whom the promise was made could sue and recover his damages, if any, in case the drawee refused to accept the bill when drawn. This view of the law, which gave the payee no rights against the drawee even when he took the bill knowing of the drawee's

[45] Neg. Inst. Law, sec. 132.
[46] Neg. Inst. Law, sec. 191.

promise to pay it when drawn, was questioned in a series of decisions, which ultimately established the anomalous doctrine of so-called "virtual acceptance," which is stated in the N. I. L.[47] as follows:

"An unconditional promise in writing to accept a bill, before it is drawn, is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value."

It is to be noted that the promise to operate as a virtual acceptance must be unconditional and in writing, and that no holder can charge the drawee upon his unconditional written promise, unless he paid value for the instrument in reliance upon it.

**§ 52. Constructive acceptance.** When a bill is presented to a drawee for acceptance, "the drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill; but the acceptance, if given, dates as of the day of presentation."[48]

The holder may give the drawee additional time, if he sees fit, to come to a decision. During the interval, whether of twenty-four hours or longer, between the presentment for acceptance and the acceptance or refusal to accept, the bill may be in the possession of the holder or the drawee. If the holder retains the bill, no difficulties arise. If, at the end of twenty-four hours or such period as the holder may allow, the bill is not accepted, the holder may treat it as dishonored by non-acceptance. If, however, the bill is left in the possession of the drawee when first presented for acceptance, the drawee, instead of returning it accepted or not accepted, may keep or destroy it. His retention may be with or without the holder's consent. If he keeps it with the consent of the holder, no legal consequences flow from the retention, even though with the surrounding circumstances it indicates an intention to accept. For, no matter how clear the intention to accept is, it is ineffectual because not "in writing and signed by the drawee."[49]

If the drawee retains or destroys the bill, without the holder's

[47] Sec. 135.

[48] Neg. Inst. Law, sec. 136.

[49] Neg. Inst. Law, sec. 132.

consent, it is clear that the holder may bring an action to recover the instrument or its value.[50] But the N. I. L. gives him extraordinary relief. He may treat the bill as accepted:

Sec. 137. Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.

This kind of acceptance by non-acceptance may well be termed a "constructive acceptance."

**§ 53. Kinds of acceptance.** "An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn."[51]

A "virtual acceptance" can not be a qualified acceptance, because it is an unconditional promise to accept a bill complying with its terms. If the bill, when drawn, does not come within the terms of the promise, it is not "virtually accepted." For obvious reasons also a constructive acceptance is always a general acceptance. But an acceptance on the bill or in a separate document may be qualified.

**§ 54. Qualified acceptance.** Sec. 141. An acceptance is qualified, which is:

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated;
2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;
3. Local, that is to say, an acceptance to pay only at a particular place;
4. Qualified as to time;
5. The acceptance of some one or more of the drawees, but not of all.

**§ 55. Conditional acceptance.** Qualified acceptances are binding upon the acceptor, subject to the qualification. For ex-

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[50] Jeune v. Ward, 1 B. & Ald. 653.

[51] Neg. Inst. Law, sec. 139.

ample, A drew a bill on B, a commission merchant, to cover the value of goods shipped to B to be sold by him. B accepted by a promise to pay when the goods were sold. It was held that B was bound by his conditional acceptance to pay the bill when the goods were sold.

§ 56. **Partial acceptance.** "I do accept this bill, to be paid half in money and half in bills" is a partial acceptance, which binds the acceptor to pay half of the bill. The promise to discharge half of the order "in bills" is not even a qualified assent to the order of the bill to pay money, and is therefore ineffective as an acceptance.

§ 57. **Local acceptance.** A bill ordering A to pay B $100, accepted by A's promise to pay it at a particular place, e. g., at the First National Bank, does not have to be presented at the place specified in order to hold the acceptor. In other words, the obligation of the acceptor, notwithstanding its terms, is held not to be conditional upon its presentment at the place named for payment. In consequence, such an acceptance "assents without qualification to the order of the drawer," and is a general acceptance.[52] But, if A accepted by promising to pay at the First National Bank only, he would be under no duty to pay unless the bill were there presented for payment, i. e., his obligation to pay would be conditional, and would not be an unqualified assent to the order. Such an acceptance is a "local" acceptance, and is binding according to its terms.

§ 58. **Acceptance qualified as to time.** If the drawee promises to pay at a time other than that designated in the bill, the acceptance is "qualified as to time," and binds the acceptor. Thus, if a bill payable Jan. 1, 1938, is presented to the drawee, and he promises to pay it Feb. 1, 1938, he is bound by his acceptance to pay on Feb. 1.

§ 58a. **Acceptance by less than all of drawees.** If the bill is drawn on several jointly, a promise by less than all to pay is not an unqualified assent to the order which directs all to pay. The promise, however, is treated as a qualified acceptance binding on the drawees who make it. The usual example of this rule

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[52] Neg. Inst. Law, sec. 139.

is the unauthorized acceptance by a partner of a bill drawn on the firm. Since the acceptance is without authority, the other members of the firm are not bound, but the partner who wrote the acceptance is held.

§ 59. **Acceptance by person not drawee.** If a person not designated in the bill as drawee attempts to accept it, the attempt results neither in a general nor in a qualified acceptance, and the would be acceptor does not become liable as such. No one except the designated drawee can accept a bill.

§ 60. **Holder may require an unqualified acceptance written on bill.** Although extrinsic written acceptances, virtual acceptances, constructive acceptances, and qualified acceptances are enforceable, the holder is entitled to have a general acceptance written on the bill itself. If this is refused, and an extrinsic written acceptance or a qualified acceptance is offered, the holder may treat the refusal as an absolute refusal to accept, and proceed accordingly.

§ 60a. **Effect of taking qualified acceptance.** "When a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto."[53]

For example, if A draws a bill on B, payable to C, who indorses and transfers the bill to D, and D takes a qualified acceptance from B without the assent of A and C, they are discharged and D must thereafter look to B alone for payment.

But "When the drawer or indorser receives notice of a qualified acceptance, he must, within a reasonable time, express his dissent to the holder, or he will be deemed to have assented thereto."[54]

## Section 5. Negotiation.

§ 61. **Transfer generally.** The payee or bearer of a negotiable instrument may either hold the instrument and collect it at maturity, or he may negotiate, i. e., transfer it to another.

[53] Neg. Inst. Law, sec. 142.
[54] Neg. Inst. Law, sec. 142.

The instrument, "if payable to bearer is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder."[1] Or, the instrument may be transferred by operation of law, for example, by the death of the payee or bearer, in which event it becomes the property of his executor or administrator; or by his bankruptcy, when it passes to his trustee in bankruptcy.

§ 62. **Who may negotiate.** Furthermore, the transferee of the payee or first bearer may negotiate the instrument. The rule then is that any owner of a bill or note may negotiate it.

If a note, payable to A and B, is indorsed by A in the names of A and B, without authority from B, and delivered to the plaintiff, the transfer, not being the act of both owners, does not pass title to the plaintiff. Again, an indorsement of a note payable to a firm, by one partner in his own name, even if authorized by the other partners, does not transfer the instrument, because the indorsement is not that of all the owners.

§ 63. **Transfer by delivery.** A bill or note payable to bearer is transferred by delivery without indorsement.[2] Delivery may be voluntary, or it may be involuntary as in the case of theft.

A voluntary delivery may be intended as a sale or gift to the transferee, or the transfer may be for the purpose of enabling the transferee to collect the instrument for the transferor. Whatever the intention, the delivery passes title, makes the transferee the owner, and, as a consequence, entitled to bring an action on the instrument and collect the proceeds. What the transferee does with the proceeds after their receipt by him does not affect the question. If the transfer was a gift or sale, he, of course, keeps them for himself; if it was simply for the purpose of collection, he holds them for his transferor. But in any event his rights on the instrument are complete and absolute.

An involuntary, as well as a voluntary delivery passes title; but, as we have seen[3] the character of the delivery makes it unconscientious for the thief, for example, to enforce his rights on

[1] Neg. Inst. Law, sec. 30.
[2] Neg. Inst. Law, sec. 30.
[3] See § 4, above.

the instrument, although an innocent purchaser from him may do so.

**§ 64. Form of indorsement.** The mode of transferring a bill or note payable to order is by indorsement. The formal requirements with which an indorsement must comply to be effective are: (1) That it be in writing on the instrument; (2) that it be an order to pay the transferee; (3) that the order direct the payment to the transferee of the whole sum due on the instrument; and (4) that the instrument with the indorsement upon it be "delivered" to the transferee.

**§ 65. Indorsement must be an order to pay.** The ordinary indorsement complies in terms with this requirement. For example, "Pay to X (Sgd.) B," indorsed on a note made payable to B by A, is an order upon the maker, A, to pay X the amount of the note at its maturity. Anything less than an order, i. e., an imperative direction, is not an indorsement.

"I assign the within note," or "I assign all my right, title and interest in and to the within note," is not an indorsement. An assignment is an authority to the assignee to collect; an order is a direction to the maker to pay.

**§ 66. Indorsement must be an order to pay the whole sum due on instrument.** If the holder attempt to split up the maker's or acceptor's obligation by directing payment of part of the sum due to one transferee, and the payment of another part to a second, the attempt is futile, is not an indorsement, and does not transfer the instrument to either. Even if partial "indorsements" which together cover the entire sum due, are made to the same person at different times, the instrument is not transferred. Of course there is no objection to indorsing a bill or note, after part of the sum due has been paid. Such an indorsement orders the payment of the whole sum due on the instrument at the time the indorsement is made. An indorsement ordering payment of a bill or note to A and B jointly is not a partial indorsement of one-half to each, for the two as a group are entitled under the order to the whole sum, but neither separately is entitled to anything. An indorsement ordering payment of the whole sum to A and also to B is manifestly contradictory in its terms, and

is neither an order to pay the whole nor any part of the sum due on the instrument to either A or B.

**§ 67. Indorsement is not binding unless instrument is delivered.** "Indorsement" means an indorsement completed by "delivery."[4] "Delivery" means, as we have already seen,[5] nothing more than a physical transfer of the instrument. Thus, if A, the payee of a note, write upon it, "Pay to X (Sgd.) A," and place the note in his safe, the indorsement is not complete. But, if in the night X breaks upon the safe and steals the note, the indorsement is complete and effective to transfer the instrument and bind A as indorser. Although X is not allowed personally to take advantage of the legal rights he has acquired, because of the manner in which he has acquired them, an innocent purchaser of his rights may do so.

**§ 68. Kinds of indorsement.** The formal requirements which have been stated apply equally to the several kinds of indorsement which are recognized. The N. I. L. says:

Sec. 33. An indorsement may be either special or in blank; or it may also be either restrictive, or qualified, or conditional.

**§ 69. Special indorsements.** "A special indorsement specifies the person to whom, or to whose order, the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument."[6] "Pay to X (Sgd.) A;" "Pay to X, or order (Sgd.) A;" and "Pay to the order of X (Sgd.) A;" are examples of special indorsements. Just as a note payable to A cannot be transferred without the indorsement of A, so an instrument specially indorsed by the payee, A, to X, cannot be transferred by X without his indorsement.

**§ 70. Blank indorsements.** If the payee writes his name upon the instrument without designating any transferee, the indorsement is blank, i. e., incomplete. If the instrument passes into the hands of a transferee he has an authority, implied from the delivery of the instrument with the incomplete indorsement upon it, to complete the indorsement by filling in his name or that

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[4] Neg. Inst. Law, secs. 191, 30.

[5] §§ 4, 42, above.

[6] Neg. Inst. Law, sec. 34.

of some other person as indorsee or transferee. If he fills in his own name, the indorsement becomes a completed special indorsement, and the legal situation is the same as if the payee had made a special indorsement to him in the first instance. Again, if he fills in the name of a third person as indorsee, upon delivery to him the person named becomes the indorsee with precisely the same results as if the payee had indorsed specially to him. However, without completing the indorsement, the first transferee may deliver the instrument. What then are the rights of the person in possession of the instrument? They are the same as those which the first transferee had, i. e., to complete the indorsement by filling in his own or a third person's name as indorsee. The consequence is, that, as long as the payee's indorsement remains "blank," the instrument is transferable by delivery and in effect payable to bearer. But as soon as it is completed, the instrument is transferable only by the indorsement of the indorsee under the special indorsement. The N. I. L. states the law in three sentences:

"The signature of the indorser, without additional words, is a sufficient indorsement."[7] "An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery."[8] "The holder may convert a blank indorsement into a special indorsement."[9]

**§ 71. Blank indorsement followed by special indorsement.** The holder of a bill or note, which has been indorsed in blank and delivered to him, may specially indorse it himself and transfer the instrument without completing the blank indorsement. In such a case, the last indorsement naming an indorsee, the instrument cannot be transferred without his indorsement. On the other hand, if the indorsee under a special indorsement transfers the instrument by a blank indorsement, the paper becomes transferable by delivery and in effect payable to bearer. For example, if H. L. Smith, the payee of a note, transfers it by the blank indorsement "H. L. Smith," so long as the indorsement remains

[7] Sec. 31.
[8] Sec. 34.
[9] Sec. 35.

in this form no further indorsement is necessary to a transfer of the note. But if B. Jones, to whom Smith delivered the note, transfers it by the special indorsement "Pay to H. Richards (Sgd.) B. Jones," the indorsement of Richards is necessary to a transfer. If Richards indorsed in blank "H. Richards," the instrument would again be transferable by delivery. The N. I. L.[10] states this rule in these words: "An instrument is payable to bearer . . . when the only or last indorsement is an indorsement in blank."

**§ 72. Special indorsement of instrument payable to bearer.** An instrument payable to bearer on its face may be specially indorsed by the holder. Such a note is still transferable by delivery and does not require the indorsement of the special indorsee for its transfer. It is not like the case of an instrument payable to order, which has been indorsed in blank and then specially indorsed. Its character as a bearer instrument remains, and it is still transferable by delivery without indorsement. Such an indorsement has the effect, however, of making the indorser liable as such in case the maker does not pay; but his liability as indorser exists only in favor of his special indorsee. For example, A, the holder of X's note, payable to bearer, transfers it to B by the special indorsement "Pay to B (Sgd.) A." B delivers the note to C without indorsing it. C, by the delivery to him, becomes the owner of the note, because it was payable to bearer, but he gets no rights against A as indorser. If B had indorsed the note to C, C might have looked for payment, not only to the maker X, but also to B as indorser.

**§ 73. Restrictive indorsement.** Under this title are grouped several kinds of indorsements of essentially different purposes and effects. The N. I. L. defines a restrictive indorsement as follows:

Sec. 36. An indorsement is restrictive which either:

1. Prohibits the further negotiation of the instrument; or
2. Constitutes the indorsee the agent of the indorser; or
3. Vests the title in the indorsee in trust for or to the use of some other person.

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[10] Sec. 9.

**§ 74. Indorsement prohibiting further negotiation.** "Pay to A only" is an example of such an indorsement. It shows an intent to prevent a negotiation by A. A special indorsement which does not contain words of negotiability, e. g., "Pay to A," is not restrictive, but is of the same effect as "Pay to A, or order." If the instrument is payable to order on its face, it is negotiable by indorsement, and there is no reason why the indorsement should read also "to order."

**§ 75. Indorsement constituting indorsee agent or trustee of indorser.** This is the kind of restrictive indorsement which is by far the most frequently used. "Pay to Bank of X, for collection for my account. (Sgd.) A," is an every day example of such an indorsement. Other examples are: "Pay to X for account of A. (Sgd.) A"; "Pay to X for my use. (Sgd.) A." Such an indorsement vests the instrument in X as agent or trustee for A. But, more important still, it notifies anyone dealing with the indorsee that X is not the beneficial owner, and of A's rights therein. Therefore, if X transfers the paper, A may reclaim it or its money proceeds from any transferee whatever into whose hands it may come. Thus, in the first example above, if the Bank of X, in order to facilitate the collection of the instrument, employed the Bank of Y for that purpose and indorsed the paper to it, the latter would hold the instrument for A's benefit just as the Bank of X had, and, though authorized to collect the money due, would hold it when collected for A and not for the Bank of X. In consequence, if the Bank of X was insolvent and was indebted to the Bank of Y, the latter could not apply the money collected to the payment of its claim against X, but would be compelled to pay it to A, the restrictive indorser. The rights which an indorsee under this kind of restrictive indorsement gets are those adapted to the purpose of the transfer, i. e., a collection of the instrument. In the words of the N. I. L.[11] they are:

"(1) To receive payment of the instrument; (2) to bring any action thereon that the indorser could bring; (3) to transfer his rights as such indorsee."

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[11] Sec. 37.

The third of these powers shows the peculiarity of this restriction, which does not restrict the further negotiation of the instrument, but expressly authorizes a transfer for the purpose of carrying out the agency. The restrictive effect of the indorsement lies simply in the fact that by its terms it notifies all transferees of the rights of the restrictive indorser.

**§ 76. Indorsement in trust for third person.** An example of this third variety of restrictive indorsement is: "Pay to X in trust for C. (Sgd.) A;" or "Pay to the order of Mrs. Mary Hook, 35 King St., for the benefit of her son, Charlie. (Sgd.) J. P. Haskins." Such an indorsement has the same effect as one in trust for the indorser himself, and is restrictive in the sense already pointed out in the last subsection, i. e., its form is notice to all purchasers of the rights of the beneficiary. But it does not prevent the further negotiation of the instrument. Taking one of the examples above, Mrs. Hook, the indorsee, has the right to transfer the instrument, but the purchaser from her is bound to ascertain at his peril whether or not she is carrying out her trust in doing so. If in fact the transfer is a breach of her trust, her son could reclaim the instrument or its proceeds from the transferee.

**§ 77. Qualified indorsement.** The effect of a blank or special indorsement is not only to transfer the instrument, but also to put the indorser under a conditional obligation to pay the instrument, if the maker or acceptor does not. If the holder of a bill or note wishes to transfer it, without assuming this obligation, he may accomplish his object by a qualified indorsement. An example of such an indorsement by H. L. Smith is: "Without recourse to me, (Sgd.) H. L. Smith;" or simply "Without recourse, (Sgd.) H. L. Smith." Any other words of the same import are sufficient to qualify the indorsement, and it makes no difference whether they precede or follow the indorser's signature. The only effect of such an indorsement is to prevent the conditional obligation of the indorser to pay if the maker does not from arising. It does not restrict the further negotiation of the instrument; nor is the indorser's unwillingness to assume that obligation such a circumstance of suspicion that the indorsee is charged with notice, if the indorser had been

guilty of fraud or such other misconduct in acquiring the instrument that the courts would not allow him to enforce it.

### Section 6. Rights of Holder in Due Course.

**§ 78. In general.** We have already discussed many cases where the legal holder of a perfectly valid negotiable instrument cannot enforce the instrument. They are cases where the means by which the holder secured his legal rights were such that it would be the grossest injustice to allow him to enforce them. Such, for example, are cases where a thief steals a note payable to bearer, and by his mere acquisition of the instrument becomes the owner thereof; or where the payee named in a note obtains the instrument by force from the maker; or where the payee by means of false statements induces the maker to deliver him a note in exchange for worthless property; or when the payee by threats of force, or duress, secures the instrument from the maker; or where the maker delivers the instrument as part of a transaction declared illegal by statute, as in the case of usury.

We have also seen, that, if in any of the instances given, the fraudulent payee or holder transfers the instrument to another who purchases it in good faith and for value, there is no reason why the purchaser, who has become the owner of a perfectly valid instrument for value and without notice of the wrongdoing of his transferor, should be deprived of the rights of an owner and be prevented from enforcing the instrument. The only defence which the maker had, in the various instances cited, was the injustice of allowing the wrongdoer to enforce the legal rights he had obtained by his fraud or imposition. Certainly this defence cannot be used against one who has acquired those legal rights without fraud or imposition, i. e., one who has paid value for them without notice of the wrongdoing. In consequence, the innocent purchaser from the wrongdoer is allowed to recover on the instrument. The doctrine may be stated as follows: One who has acquired the ownership of a negotiable instrument, in good faith and for value, is entitled to exercise all the rights incident to ownership, and may enforce the instrument, notwithstanding the defenses which the parties liable on the instrument

may have had against the person from whom he purchased it. One entitled to the benefit of this doctrine was called, before the N. I. L., a "bona fide purchaser for value without notice." The N. I. L. terms him a "holder in due course" of business. To be a holder in due course, according to our statement of the rule, the holder must have (1) acquired an existing instrument; (2) in good faith and without notice of any defenses thereto; and (3) for value paid by him therefor.

**§ 79. Illegality and other defects.** Even though the instrument is intentionally made and delivered, it may be absolutely void by statute, as, for example, in some states, notes given in payment of gambling debts. In such a case the innocent purchaser acquires nothing by his purchase. Negotiable instruments made by infants and insane persons are further illustrations. All contracts of infants and insane persons are by law void or voidable. In consequence, one who purchases a note made by one of either of those classes of persons purchases a voidable instrument only, and neither the completeness of his innocence nor the amount of value given, can give him anything more than a voidable instrument, i. e., an instrument against which the maker may plead his infancy or insanity.

**§ 80. Purchase of instrument must be in good faith and without notice of defenses.** If one purchases a bill or note, knowing of the defense which the acceptor or maker has against his transferor, there is no reason in justice why the defense should not be good against him also. On the contrary, there is every reason why the defense should be available against him. It was his own folly that he paid value for the instrument. In consequence, the purchaser is not protected unless he purchased in good faith and without notice of defenses.

**§ 81. Constructive notice.** The purchaser of a bill or note is charged with knowledge of everything appearing on the instrument itself. That is to say, regardless of his actual knowledge, he is treated as if he knew every fact and the legal consequences of every fact which the paper itself discloses. This is the doctrine of constructive notice.

**§ 82. Purchase after maturity.** The most important application of the doctrine of constructive notice is to instruments trans-

ferred after their maturity, i. e., after they are due. A bill or note does not lose its quality of negotiability at its maturity, but the fact that a mercantile obligation has not been paid when due is by itself enough to put all purchasers on inquiry as to its validity. Since, whether the instrument is due or not appears upon its face, a purchaser after maturity, under the rule of constructive notice, always takes the instrument subject to all defenses which the maker or acceptor had against his transferor.

**§ 83. Purchase from partner, agent, or trustee.** If one takes a negotiable instrument signed by one of the partners in the firm name, in payment of the personal debt of the partner who executed the instrument, the creditor must know from the face of the paper that it was signed by his debtor as agent for the other partners, and, in consequence, he is charged with constructive notice of the absence of authority, if such be the case, on the part of his debtor to bind the other partners for his personal debts. Again, if the officer of a corporation draws a check against the corporation's bank account, in the name of the corporation, and delivers it in payment of his personal debt, the creditor who receives it cannot be a holder in due course, but is charged with constructive notice of the officer's breach of trust in using corporate funds to pay his own debts.

**§ 84. Notice to purchaser before he has parted with value.** In a case where the payee of a note, who has secured it from the maker by fraud or other unconscientious means, indorses it to X, who in good faith and without notice agrees to pay a fair price, but receives notice of the maker's defense before he has actually paid the price to the payee, it is clear that the purchaser should not be protected, if he pays after notice. To protect him under such circumstances would be just as inequitable as to protect one who has received the instrument as a gift. The law will not protect the purchaser from his own folly or assist him in a fraud upon the maker as the case may be. The courts have applied the same reasoning to cases where the purchaser has paid part but not all of the agreed price before he receives notice, and treat such a purchaser as a holder for value only to the amount he has paid before notice.

## Section 7. Obligations of Parties and Transferors.

**§ 85. Presentment for payment.** The maker of a note or acceptor of a bill is unconditionally bound to pay the holder at maturity, and it is his duty to seek him out and discharge his obligation by payment. It is not the duty of the holder to disclose his whereabouts or to present the instrument for payment, but he may if he chooses, the instant the instrument is overdue, institute an action against the acceptor or maker and compel him to pay not only the sum due upon it, but also the costs of the action. Notwithstanding the very terms of a bill or note payable on demand, this rule is applied to them, and it is the duty of the maker or acceptor to pay without demand.[2] Even where the instrument is expressly payable at a special place, e. g., at a particular bank, the holder is not bound to present it at the bank for payment; nor is the maker or acceptor discharged by having money deposited in that bank set apart for the payment of the instrument. The N. I. L.[3] does provide that "if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part." But even a tender of payment does not discharge the acceptor or maker; its utmost effect is to stop the running of interest, and to prevent the holder from recovering the costs in an action brought after the tender.

The person primarily liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are "secondarily" liable.

**§ 86. Order of liability of parties.** The normal liability of the various parties to a negotiable instrument may be made plain by an illustration. A draws a bill of exchange on X payable to B, and delivers it to B. By drawing the instrument A assumes an obligation to B, or if B transfers the bill, to whomever happens to be the holder, to pay the bill, if X, the drawee, refuses to accept and pay. So far, A is the only party bound on the bill. B secures X's acceptance. Thereupon X becomes

[2] Sec. 70.
[3] Sec. 70.

primarily and unconditionally bound to pay B, or, if B transfers the bill, to pay whomever happens to be the holder. Now there are two obligations on the instrument running to B. B indorses to C. C, by the transfer, gets B's rights against both the acceptor, X, and the drawer, A; but he also obtains a third obligation, i. e., that of B, as indorser, who by his indorsement promises to pay if the acceptor does not. C indorses to D, and D thereupon succeeds to the rights of C against X, A, and B, and also obtains the conditional liability of C as indorser. At maturity it is the duty of the acceptor, the person primarily liable, to pay D forthwith. If he does pay, not only his own but every other obligation on the instrument is discharged. A's, B's and C's liability was only a conditional one, to pay if X did not. If X does not fulfil his obligation, then, upon presentment and after the necessary proceeding upon dishonor, the liability of each of the other parties becomes absolute, and each is bound to pay D the amount of the bill forthwith.

§ 87. **Same (continued).** D may collect from any one of the three he chooses, but, of course, he is not entitled to receive the amount of the bill from more than one of the parties. If he collects from C, the latter, receiving the instrument from D, becomes the holder and comes within the promise of the acceptor. He also falls precisely within the contract of both A and B for the same reason, i. e., that he has become the holder. C, then, at his option, may look either to X, or to A, or to B for payment. If he secures payment from X, the instrument is discharged just as it would have been had the acceptor paid the holder, D, in the first instance. If he looks to B and recovers, B may in turn recover from either X or A. If the acceptor pays B, the instrument is discharged and with it the liability of A. But if B compels A, the drawer, to pay, he has no one from whom to seek reimbursement except X, the acceptor. If D had in the first place collected from A, the drawer, the result would have been the same: A's payment would have discharged the indorsers, B and C. Had D looked to B, the first indorser, B's payment would have discharged C, the second indorser. As between themselves, the drawer and indorsers are liable in the order in which they became parties to the instrument. That is to

say, an indorser who has been compelled to pay, may seek reimbursement from the drawer and the prior indorsers, but not from subsequent indorsers. But, as between the drawer and indorsers on the one hand, and the holder on the other, the drawer and each of the indorsers is liable, without regard to the order of time in which they respectively became parties to the instrument.

§ 88. **Same: Among indorsers.** In determining the order of liability of the indorsers among themselves, it is the order in time in which they become parties to the instrument which controls, and not the order in which their signatures appear on the back of the paper. H. L. Smith, the payee of an instrument, may have placed his blank indorsement, "H. L. Smith," across the back near the middle, and his transferee, H. Richards, may have indorsed in blank placing his signature above that of Smith. Nevertheless, Smith, the payee, is the first indorser and liable as such, and Richards is the second indorser. When it is remembered that the indorsements do not even have to be on the back of the instrument, but may be scattered over its face, it is obvious that the order of the names on the paper is not a reliable guide to the order of the indorsers' liability.

§ 89. **Qualified indorsement.** An indorser "without recourse" refuses to assume the contract obligation of an indorser, and consequently is not bound as such. His responsibility to his transferee is described in §§ 90-91, below.

§ 90. **Liability of transferor as seller.** The transfer of a negotiable instrument for a consideration is a sale, and the transferor is therefore subjected as seller to certain liabilities to his transferee, similar to those of the seller of any property. These liabilities are not the result of indorsement, but arise quite independently because the transfer is a sale. In consequence, they are the same in a case of a transfer of a bearer instrument by delivery, and in the case of a transfer by an indorsement without recourse.

§ 91. **Warranties of transferor.** The N. I. L. states the warranties of the seller of a bill or note as follows:

Sec. 65. Every person negotiating an instrument by delivery or by a qualified indorsement, warrants:

1. That the instrument is genuine and in all respects what it purports to be;

2. That he has a good title to it;

3. That all prior parties had capacity to contract;

4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee. The provisions of subdivision three of this section do not apply to persons negotiating public or corporate securities, other than bills and notes.

Sec. 66. Every indorser, who indorses without qualification, warrants to all subsequent holders in due course:

The matters and things mentioned in subdivisions one, two and three of the preceding section.

### Section 8. Presentment and Proceedings on Dishonor.

**§ 92. Necessity of presentment.** The maker or acceptor of a negotiable instrument is bound to pay at maturity, without a presentment or any demand of payment whatever, even in the case of a note payable "on demand,"[4] but the first step in making absolute the conditional liability of the drawer and indorsers is presentment for payment to the maker or acceptor.

**§ 93. Day for presentment.**

"Where the instrument is not payable on demand, presentment must be made on the day it falls due."[5] "Every negotiable instrument is payable at the time fixed therein without grace."[6]

If the instrument is payable Jan. 1st, presentment must be made on that day. An instrument dated Jan. 31st, and payable one month after date, must be presented on Feb. 28th or 29th, as the case may be. A bill or note dated Jan. 1st, payable "ten days after date," must be presented on Jan. 11, and a note payable "ten days after my death," the maker of which dies on

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[4] See § 85, above.

[5] Neg. Inst. Law, sec. 71.

[6] Neg. Inst. Law, sec. 85.

Jan. 1st, matures and must be presented on Jan. 11th. As the N. I. L. says:

Sec. 86. Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment.

Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday.[7]

**§ 94. When demand instruments must be presented.** The payee of a bill or note payable on demand is entitled to its payment immediately upon its delivery, and, if he chose, he might forthwith maintain an action upon it against the maker or acceptor. In this sense a demand instrument is due on the day of its issue, and, if the ordinary rule were applied—that presentment must be made at maturity—a presentment good against parties who indorsed after that day would be impossible. But the rule is that an instrument indorsed after maturity is, as regards the person so indorsing, payable on demand.[8] Thus the ordinary rule cannot apply to demand instruments. The N. I. L. says that when the instrument "is payable on demand, presentment must be made within a reasonable time after its issue."[9] For example, X, the holder of a demand note made by A and indorsed successively by B, C, and D, by presenting it to A, within a reasonable time after its issue by A, could hold the indorsers. Suppose, however, X held the note until after a reasonable time had elapsed, and then indorsed to Y. As regards X, the instrument would have the effect of a note payable on demand issued on the day of his indorsement. Consequently, if Y made a presentment for payment to the maker, A, within a reasonable time after X's indorsement, the presentment would be good as against

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[7] Neg. Inst. Law, sec. 85.
[8] N. I. L., sec. 7.
[9] N. I. L., sec. 71.

X, although of course it would not revive the liability of the prior indorsers, B, C, and D.

**§ 95. Place of presentment: When place specified.** The place of payment of a negotiable instrument may be designated either by expressly making it "payable at" a specified place, or by the maker or acceptor adding an address to his signature. An instrument in which the place of payment is specified must be there presented.[10] Where the place named is a town, e. g., New York City, the presentment must be at the residence or place of business of the acceptor or maker in New York City; but, if he has neither, the presence of the instrument in the city in the possession of the holder or his agent authorized to collect, is the proper mode of presentment. The most convenient mode of effecting the presentment of a bill or note, payable generally in a city or town, is to send it for collection to a bank doing business there. The bank then would present it at the maker's or acceptor's office or residence, or, if he had neither, the presence of the bill in the bank would be sufficient. A presentment not made at the place specified for payment is of no effect. For example, a personal presentment to the maker or acceptor at another place, or a presentment at his actual place of business or residence, if that is not the place specified, is insufficient.

**§ 96. Same: When no place specified.** If no place of payment is specified in the instrument, presentment must be made at the place of business or the residence of the maker or acceptor.[11] The holder may choose either and is not bound to present at both, even if no one is found at the place chosen. If the maker or acceptor has either an office or a home, a personal presentment to him elsewhere, for example, on the street, or in another's office, is insufficient.

If no place of payment is specified in the instrument, and the maker or acceptor has no place of business or residence, the presentment is good if made to the maker or acceptor personally wherever he can be found, or if made at his last known place of business or residence. In such a case, if the maker or acceptor's

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[10] Neg. Inst. Law, sec. 73 (1) (2).

[11] Neg. Inst. Law, sec. 73 (3).

whereabouts or his last place of business or residence cannot be ascertained by the holder after a reasonable effort, the drawer and indorsers of the bill or note are bound without presentment. The N. I. L. provides for such a case as follows:

Sec. 82. Presentment for payment is dispensed with: (1) Where after the exercise of reasonable diligence presentment as required by this act cannot be made. . . .

**§ 97. Hour of presentment.** Not only must the presentment be made on the proper day and at the proper place, but it must be at a reasonable hour. If the place of payment is a business office, the customary hours of business would fix the exterior limits of the time for presentment. These naturally vary in different towns. If a presentment is properly made at a residence, it should be made between the usual hours of rising and retiring in that community.

**§ 98. Hours for presentment at bank.** When the place of presentment is a bank, presentment must be made during banking hours, i. e., the hours during which the bank is open for the transaction of business over its counters. Presentment after banking hours, though the bank's doors may still be open and its officers present, is too late. There is, however, an exception to this rule which has been sanctioned by the N. I. L.:

Sec. 75. Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.

**§ 99. Presentment must be by holder or his agent.** Any person in possession of a bill or note payable to bearer or indorsed in blank is the holder of the instrument, and a proper person to make presentment, whether or not he is in fact acting for himself or for the benefit of a third person who is entitled to the proceeds when collected. But the holder of a note specially indorsed to him, who does not wish to present it in person, may employ an agent for the purpose. There is no necessity of indorsing the instrument to the agent, even by a restrictive indorsement; nor is any written authorization necessary. A simple de-

livery of the instrument unindorsed, with authority to collect it, constitutes the agent a proper person to make a presentment.[12]

**§ 100. To whom presentment must be made.** The N. I. L. says:

Sec. 78. Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all.

Sec. 77. Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.

This rule—that where there are several makers or acceptors who are not partners, presentment must be made to each—does not mean that personal presentment to each is necessary, but that such a presentment to each must be made as would be sufficient were he the only maker or acceptor. So far as personal presentment is concerned, the rule is the same with respect to instruments with several makers or acceptors, as in the case of instruments with one maker or acceptor. No personal presentment of an instrument payable at a particular place is necessary. If the holder or his agent, with the bill or note in his possession, applies for payment at the place specified, at a reasonable hour, the presentment is good, whether the acceptor or maker or any one representing him is present or not. Where the proper place of presentment is the office or the residence of the acceptor or maker, the presentment is good, even if the doors of the office or house be closed and no answer can be obtained. In this case it is the place and not the person to whom presented, which determines the effect of the presentment.

**§ 101. Presentment is demand of payment accompanied by exhibition of instrument.** Since the instrument must be surrendered upon its payment, a presentment for payment should be accompanied by a production of the instrument, or, at least, an ability forthwith to produce it. If the maker or acceptor unqualifiedly refuses to pay before the instrument is produced, there

[12] Negot. Instr. Law, sec. 72 (1).

seems to be no occasion for the formal act of exhibiting it. The N. I. L. provides generally:

Sec. 74. The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.

**§ 102. When presentment for acceptance necessary.** Until a bill of exchange has been accepted, the drawee is under no obligation to the payee or holder to pay it. The rights of the holder are against the drawer and indorsers, who have promised conditionally to pay if the drawee does not. If the holder wishes the promise of the drawee, he may present the bill to the drawee requesting his acceptance. But, in general, the holder has the option, either of presenting the bill before maturity for acceptance, or of waiting until maturity and presenting it for payment. There are, however, certain cases where the failure of the holder to make a presentment for acceptance will discharge the drawer and indorsers.[13] The N. I. L. enumerates them as follows:

Sec. 143. Presentment for acceptance must be made:

1. Where the bill is payable after sight, or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument;

2. Where the bill expressly stipulates that it shall be presented for acceptance; or

3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

**§ 103. Dishonor by non-acceptance.** Whether a presentment for acceptance is necessary or not, if it is actually made and the drawee refuses to accept, the bill is dishonored and the holder is entitled to immediate payment from the drawer or indorsers, although the bill may not be due for months or years.[14] But the obligations of the drawer and indorsers are conditional upon due notice of dishonor, which must be given in accordance with the rules governing a notice of dishonor by non-payment.[14a]

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[13] Neg. Inst. Law, sec. 144.

[14] N. I. L., sec. 150.

[14a] See §§ 104-118, below.

**§ 104. Notice of dishonor.** After presentment to the acceptor or maker, the next step in fixing the liability of the drawer and indorsers is notice to them that the instrument has been dishonored. Such a notice is called a notice of dishonor.

The notice (1) ought to identify the dishonored instrument, and (2) must indicate that it has been dishonored by non-payment.

**§ 105. Indication of dishonor.** An instrument is "dishonored by non-payment when it is duly presented for payment and payment is refused or cannot be obtained."[15] An indication of dishonor is therefore an indication (1) that a technical presentment for payment has been made, and (2) that the instrument is unpaid. Both of these elements of a "dishonor by non-payment" must appear from the notice. Under this rule, a mere statement that the instrument is due and unpaid is insufficient. There may have been no presentment. Again, a statement that payment has been demanded is not enough. Due presentment is a presentation of the instrument to the maker or acceptor, as well as a demand. A notice stating directly that the instrument has been "dishonored" or "protested" is valid, because the reasonable intendment is that the proper steps to dishonor the paper have been taken.

**§ 106. By whom notice may be given.** The proper person to give notice of dishonor in the first instance is the holder. But any indorser to whom the holder has given notice may also serve notice on indorsers prior to him. If he were not permitted to do this, the liability of the prior indorsers to him might not be fixed; for the holder is not obliged to give notice to all indorsers, but only to such as he wishes to hold, and only indorsers to whom notice is sent are bound. However, before an indorser can give notice, his liability as such must have been fixed. A notice of dishonor can be given only by the holder, or by an indorser whose liability to pay the holder has become absolute. For example, a notice by an indorser who has been discharged, because no notice has been served upon him, is ineffectual. So also is a notice sent by a stranger. The N. I. L. says:

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[15] Neg. Inst. Law, sec. 83.

Sec. 90. The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given.

An illustration may make this clearer. X is the holder of a note, indorsed successively by A, B, C, and D. Upon dishonor, X may give notice to all the indorsers, in which event each becomes responsible to X for the amount of the note; or he may give notice to D only. If he pursues the latter course, D's responsibility to X being fixed, D may, in order to protect himself, give notice to any or all of the three prior indorsers. Neither B nor C, however, is entitled to give notice to A, until notice has been received from D.

**§ 107. Effect of notice.** Suppose D does send notice to C, and C in turn to B, what effect has the serving of these notices on the rights of the holder? They have the same effect in fixing the liability of B and C as notices sent by him personally. In like manner, C's notice to B enures to the benefit of D. The result is that each of these indorsers, B, C, and D, is responsible for the amount of the note to X; if D pays it, he may look for reimbursement to either B or C; but if B pays it, he is without recourse on A, who has received notice from no one. The N. I. L. states the rule as follows:

Sec. 93. Where notice is given by or on behalf of a party entitled to give notice, it enures to the benefit of the holder and all parties subsequent to the party to whom notice is given.

If we suppose that the holder, X, instead of notifying D only, had also notified A, the notice would fix the liability of A not only to X but also to D. And, to carry the case a step further, had D notified B and C, the intermediate indorsers between him and A, the notice to A would operate for their benefit as well as for that of D. In other words, due notice from the holder to the first indorser fixed his liability to all subsequent indorsers who were themselves bound to the holder. The N. I. L. says:

Sec. 92. Where notice is given by or on behalf of the holder,

it enures to the benefit of . . . all prior parties who have a right of recourse against the party to whom it is given.

**§ 108. Notice by agent.** It is not necessary for the holder, or for a party entitled to give notice, to attend personally to the matter. He may, and usually does, act by an agent.

**§ 109. Time within which notice must be given.** Notice of dishonor may be given as soon as the instrument is dishonored.[16] If a bill or note is presented at ten o'clock in the morning of the day of maturity and payment is not obtained, the dishonor is complete and notice may at once be given. Or, if an indorser receive notice from the holder, he may at once notify the prior indorsers. But such expedition is not necessary. The time within which notice must be given is determined by certain definite rules which have been incorporated in the N. I. L.:

Sec. 110. Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following.

2. If given at his residence, it must be given before the usual hours of rest on the day following.

3. If sent by mail, it must be deposited in the post-office in time to reach him in usual course on the day following.

**§ 110. Same (continued).**

Sec. 104. Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

1. If sent by mail, it must be deposited in the post-office in time to go by mail the day following the day of dishonor, or, if there be no mail at a convenient hour on that day, by the next mail thereafter.

2. If given otherwise than through the post-office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post-office within the time specified in the last subdivision.

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[16] Neg. Inst. Law, sec. 102.

Sec. 94. Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal, upon the receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder.

**§ 111. Successive notices.** An illustration of the operation of these rules will show that, although the time within which a notice of dishonor must be given or despatched by mail is fixed, the time within which an indorser will receive notice may vary greatly with the circumstances. Y is the agent for collection of a bill for the holder X. The bill is indorsed by A, B, C, D, and E, who indorsed successively in the order named. Upon dishonor, Y, the agent, may notify each of the five indorsers on behalf of the holder X. If he pursues this course the notices if sent by mail, must be deposited in the post-office not later than the day following the dishonor. A delay by him until the second day after dishonor (unless the circumstances bring the case within Sec. 104-1) would discharge A, B, C, D, and E. Y, however, instead of notifying the indorsers, may despatch a notice by mail to his principal, X. Upon its receipt, X may wait until the day following before mailing a notice to E, the fifth and last indorser. E, taking the full time allowed for giving notice, may notify the fourth indorser, D, who in turn notifies C, and so on. It is perfectly possible that several weeks or even longer may elapse before A, the first indorser, receives notice. Yet when he is notified, he is just as effectually bound as if a notice had been sent him directly by the holder or his agent.

**§ 112. To whom notice must be given.** The N. I. L. provides:

Sec. 100. Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others.

Sec. 99. Where the parties to be notified are partners, notice to any one partner is notice to the firm, even though there has been a dissolution.

Sec. 98. When any party is dead, and his death is known

to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased.

§ 113. **Where notice must be sent.** If the message constituting the notice, whether oral or in writing, whether delivered in person, by messenger, or sent through the mail, is actually received by the indorser, within the time that would have been required for delivery had the notice been sent to the place designated by the law as the proper address to which the notice must be sent, the notice is sufficient.[17] But, if the holder does not wish to assume the risk of the message being actually received within the proper time, the simple course, whatever the means of transmission may be, is to address it in accordance with the following rules laid down in the N. I. L.:

Sec. 108. Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows:

1. Either to the post-office nearest to his place of residence, or to the post-office where he is accustomed to receive his letters; or

2. If he live in one place, and have his place of business in another, notice may be sent to either place; or

3. If he is sojourning in another place, notice may be sent to the place where he is so sojourning. . . .

§ 114. **Same: Illustrations.** If the indorser were a farmer, who, to suit his convenience, received his mail at the one of two neighboring post-offices more distant from his home, notice might properly be sent to either under Rule 1. Rule 2 would apply to the case of an indorser residing in a suburban town whose place of business is in a large city.

§ 115. **When notice dispensed with or delay excused.** If, within the regular period for sending notice, the necessary data to enable the holder to give proper notice cannot, after the ex

[17] Neg. Inst. Law, sec. 103

ercise of reasonable diligence, be ascertained, a delay is excused. But, "when the cause of delay ceases to operate, notice must be given with reasonable diligence." [18]

**§ 116. Necessity for protest.** The conditional liability of the drawer and indorsers of promissory notes and of inland bills of exchange is fixed by a due presentment and due notice of dishonor. But in the case of foreign bills of exchange, an additional act must be performed by the holder in order to charge the drawer and indorsers. He must protest the bill.

**§ 117. Inland and foreign bills.** An inland bill is one drawn and payable in the same state. A foreign bill is one drawn in one state and payable in another. Thus, a draft drawn in Wisconsin, directing payment to be made in Chicago, is a foreign bill. In case neither the place of drawing nor the place of payment appears from the face of the bill, the holder may treat the instrument as an inland bill.[19] This option is given the holder in order to relieve him from the necessity of determining at his peril whether or not a protest is necessary.

**§ 118. Requisites of protest.** The first step in protesting a bill of exchange is its formal presentment for acceptance or payment, as the case may be; the second, is "noting" the dishonor; and the third, the preparation and execution of the certificate of protest. Each of the steps must be taken by a notary public.[20] The presentment by the notary must be in accordance with the ordinary rules governing presentment.[21] The "noting" is the making by the notary of a memorandum on the bill of the facts later to be incorporated in the certificate of protest. The "noting" must be made on the same day as the presentment and dishonor. If the certificate is executed by the notary upon the day of presentment, there is no occasion for a "noting." But either the "noting" or the certificate itself must be made on that day.[22] If the certificate is not then executed, "the protest may be subsequently extended as of the date of the noting." [23] The

[18] Neg. Inst. Law, sec. 113.

[19] Neg. Inst. Law, sec. 129.

[20] N. I. L., sec. 154; Ocean Bank v. Williams, 107 Mass. 141.

[21] See §§ 92-101, above.

[22] Neg. Inst. Law, sec. 155.

[23] N. I. L., sec. 155.

requisites of the certificate of protest, called the "protest," which is a document signed and sealed by the notary who presented the bill, are stated in the N. I. L.:

Sec. 153. The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify:

1. The time and place of presentment;
2. The fact that presentment was made and the manner thereof;
3. The cause or reason for protesting the bill;
4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

## Section 9. Checks.

**§ 119. Peculiarities of checks.** A bill of exchange drawn on a bank and payable on demand is called a check. There would be no occasion for mentioning this particular kind of bill, were it not for two peculiar rules applicable to them. Apart from these peculiarities a check stands on the same footing as any other bill.[1]

**§ 120. Certification.** Instead of demanding payment, the holder may present a check to the bank on which it is drawn requesting that the bank certify upon its face that the drawer's account is "good" for the amount of the check. If the bank assents to the request by writing "Certified" or "Good" upon the check, the bank makes the instrument its own absolute obligation—in effect, its promissory note or certificate of deposit, and the drawer and indorsers are discharged.[2] Thereafter, the holder must look to the bank alone for payment. The instrument, however, continues negotiable, and, if it is transferred by indorsement, the indorsers subsequent to the certification are of course liable as such. For the same reason, if the drawer of a check secures its certification before he delivers it to the payee, he remains liable. The practical consequence is, that, if the holder obtains the certification, he is the loser in the event of the bank's

[1] Neg. Inst. Law, sec. 185.
[2] N. I. L., sec. 188.

failure; but, if the check was certified for the drawer, he is responsible in case of the bank's insolvency.[3]

**§ 121. Time within which checks must be presented: To hold drawer.** The general rule is that bills of exchange payable on demand must, in order to charge the drawer and indorsers, be presented within a reasonable time after their issue. But the drawer of a check remains liable thereon indefinitely, unless he is actually injured by the delay in making presentment. "A check must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay."[4] Furthermore, what is a reasonable time within which to present a check within this rule is a question to which usage has given a more definite answer than in the case of other kinds of bills. In Grange v. Reigh,[5] for example, it appeared that the defendants, after banking hours on July 20, drew and delivered to plaintiff in Milwaukee, where plaintiff resided, a check for $1,211 upon the South Side Savings Bank, located in Milwaukee. The check was not presented on July 21st, during all of which day the bank was open and would have paid the check had it been presented. The bank did not open after July 21, by reason of which the check was not paid. In holding that the loss by reason of the bank's failure must fall upon the plaintiff, the court said: "The settled law applicable to the facts of this case, is, that, if a person receives a check on a bank, he must present it for payment within a reasonable time, in order to preserve the right of recourse on the drawer in case of non-payment by the drawee; and that, when such person resides and receives the check at the same place where such bank is located, a reasonable time for such presentation reaches, at the latest, only to the close of banking hours on the succeeding day, excluding Sundays and holidays. Plaintiff failed to comply with the law in this respect; hence defendants were discharged from all liability to answer for the default of the bank."

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[3] Head v. Hornblower, 156 Mass. 458.
[4] Neg. Inst. Law, sec. 186.
[5] 93 Wis. 552

**§ 122. Same: To hold indorsers.** With respect to indorsers also a check must be presented more promptly than other bills. When the parties all reside in the same place, the holder should present the check on the day it is received or on the following day; and, when payable at a different place from that in which it is negotiated, the check should be forwarded by mail on the same or the next succeeding day for presentment.[6]

### Section 10. Discharge of Instrument.

**§ 123. Payment.** Payment by the acceptor or maker to the holder, at or after maturity, discharges the contract of the acceptor or maker and the contract of every other party to the instrument.

**§ 124. Payment must be to the holder.** Payment to effect a discharge must be to the holder, i. e., the legal owner of the instrument.[1] In consequence, payment to the person in possession of a bill or note payable to order, upon which the payee's indorsement is forged, is not a discharge of the instrument.[2]

**§ 125. Payment must be at or after maturity.** Payment before maturity does not discharge a negotiable instrument.[3] Its utmost effect is to make it unconscientious for the holder who has received payment to enforce the instrument. In such a case therefore, the person paying it should insist upon a surrender or cancelation of the bill or note, in order to prevent the holder from transferring it to an innocent purchaser.

**§ 126. Payment by drawer or indorser.** Payment by the drawer of a bill, or the indorser of a bill or note, satisfies his liability to the holder, but does not discharge the instrument, or the obligations of the maker or acceptor and the prior indorsers. Upon his payment he is entitled to receive the instrument from the holder, and to enforce it against the prior parties, or, if he wishes, to transfer it by way of sale or gift. The N. I. L. provides:

Sec. 121. Where the instrument is paid by a party second-

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[6] Smith v. Janes, 20 Wend. 192 (N. Y.).
[1] N. I. L., secs. 119 (1), 88.
[2] Smith v. Sheppard, Chitty on Bills (10th Ed.) 180, note.
[3] Neg. Inst. Law, secs. 119 (1), 88.

arily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument.

§ 127. **Same: Illustrations.** For example, C sells property worth $100 to B, taking in payment a note of $100 made by A payable to B, indorsed by B to C. C indorses the note to D. A does not pay at maturity, and C is compelled to pay D. C can enforce the instrument against A or B. The instrument is not discharged, because the absolute and unconditional promise of the acceptor or maker to pay has not been fulfilled by the indorser's payment in satisfaction of his own obligation to pay if the maker or acceptor does not. The prior indorsers are not discharged, because they have assumed an obligation to every subsequent holder to pay if the maker did not, and he has not paid. The indorser who has paid and received the instrument is entitled to enforce it against the prior parties, or to transfer it because he has become the holder.[4] The indorser who has taken up the instrument can not enforce it against indorsers subsequent to himself.

§ 128. **Cancellation and alteration.** In addition to payment by the acceptor or maker, there are two other principal ways in which a negotiable instrument may be discharged, cancellation and alteration.

The N. I. L. enumerates what alterations are material as follows:

Sec. 125. Any alteration which changes:

1. The date;
2. The sum payable, either for principal or interest;
3. The time or place of payment;
4. The number or the relation of the parties;
5. The medium or currency in which payment is to be made;

or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.

§ 129. **Discharge of indorsers.** The discharge of the instru-

[4] Serra v. Berkley, 1 Wilson, 46; Callow v. Lawrence, 3 Maule & S. 95.

ment by payment, cancellation, or alteration extinguishes the obligation of every party liable on it. But an indorser may be discharged without a discharge of the instrument. For example, he is discharged by an intentional cancellation of his signature.[5] An indorser is also discharged by any dealings of the holder with prior parties, which affect the indorser's right to proceed against them in case he is compelled to pay the holder.[6] For example, if the holder of a note indorsed by A, B, and C, intentionally cancels A's signature, B and C are discharged. By the cancellation of A's indorsement his liability on the instrument is discharged, and the right of B and C to look to him for reimbursement is gone. In consequence it would be unjust to allow the holder to collect from B and C.[7]

[5] Neg. Inst. Law, sec. 120 (2).

[6] N. I. L., sec. 120.

[7] See Newcomb v. Raynor, 21 Wend. 108.

## CHAPTER XII.

## GUARANTY AND SURETYSHIP.

**§ 1. Parties to suretyship agreements.** A person who engages to be answerable for the debt, default, or miscarriage of another is called a surety or guarantor. He undertakes to pay either jointly or severally with the principal, the debtor who is primarily liable; or he may undertake to pay only if the latter does not. He is an insurer of the debt, and is usually bound with the principal by the same instrument, executed at the same time, and for the same consideration, and is often an original promisor and debtor from the beginning. When there are two or more sureties bound with the principal for the performance of the same obligation, or parts of the same obligation, they are co-sureties even though bound for different sums and though they become bound at different times. Thus if A is the principal on a bond for $2,000, and B becomes surety for the entire sum and C surety for $1,500 of it, B and C are co-sureties and may have a right of contribution as to each other, i. e., if one has to pay the debt, he can force the other to contribute or share the burden with him. B and C in the above example are co-sureties, that is, they are bound for the performance, by the same principal, of the same obligation. Co-sureties may become bound at different times, for different amounts, and may be ignorant of the fact that there are other co-sureties. So long as it is for the performance of the same obligation they are co-sureties.

**§ 2. Statute of frauds.** The fourth section of the old English statute of frauds provided that no action should be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, should be in writing and

signed by the party charged therewith or by some other person thereunto, by him lawfully authorized. This section of the statute of frauds has been re-enacted throughout the United States with but few modifications. Although there are technical distinctions between classes of contracts which are and which are not required by these statutes to be put in writing, the safe course to follow is to make all contracts of guaranty or suretyship in writing.

**§ 3. Common forms of suretyship.** Suretyship may be created by express contract or may arise by operation of law, but the law is the same no matter in what manner created. A grantee of mortgaged land, who assumes the mortgage debt, becomes principal and his grantor his surety for the debt, as between themselves. Likewise, where a lessee who is personally bound to pay rent on his lease assigns the lease, he stands in the position of a surety for the rent as to the assignee of the lease. A similar case of suretyship arises, when a partnership is dissolved and one partner assumes the firm debts. He thereby becomes principal and the other party surety for the debts, as between themselves. Indorsers on promissory notes are sureties as to the makers. Property may stand in the position of surety for a debt, as where a man pledges his property as security for the performance of an obligation of another. Parties may even be placed in the position of sureties against their wills, as for instance where A and B each makes his negotiable note and sends it to C to sell on commission, and C wrongfully pledges the note to D to secure debts due D from him. A and B are in effect sureties for the debt of C, for D, being a bona fide purchaser of the notes, can sue on them, while of course the debt secured is the debt of C.[1]

**§ 4. Consideration.** A contract of suretyship must be supported by a sufficient consideration. This must consist of some detriment to the promisee. Whatever consideration is sufficient to sustain the promise of a principal will sustain a surety's promise which is concurrent with that of the principal. When the contract between creditor and principal is induced by the surety's promise to the creditor, the making of such contract is

[1] McBride v. Potter, Lovell Co., 169 Massachusetts, 7.

sufficient consideration. However, when the surety's promise is subsequent to the creation of the debt, and the creation of the debt is not an inducement to it, there must be some new consideration or such promise will be void. An agreement by the creditor, to forbear the collection of a debt for a definite time, is a good consideration for a surety's promise,[2] as is also an agreement to extend the time of payment.[3] Any other consideration sufficient to support a contract may be given to make the surety's promise binding. See Chapter I, §§ 26-36.

**§ 5. Creditor not bound to press his claim against principal debtor.** The fact the creditor might have recovered the money due him, had he been diligent in pressing his claim against the principal, is no defense to the surety, for the creditor is not obliged to sue the principal. He may wait as long as he pleases before pressing his claim, so long as he does no affirmative act which is prejudicial to the surety's rights. The surety, if he considers the creditor is not diligent enough in pressing his claim, always has the privilege of paying the claim and then proceeding against the principal to secure reimbursement.

**§ 6. Discharge of surety by affirmative act of creditor.** It is well settled law that when the creditor does an affirmative act which prejudices any right of the surety, the surety is thereby released from his obligation to the creditor. An idea of what constitutes an injury to the surety's rights can best be obtained by taking up a few of the cases on the subject. It may be well to state here that the question is not whether the surety is actually damaged by the act of the creditor or not, but whether there is a possibility that he might suffer damage.

**§ 7. Extending time of payment.** The creditor has no right to extend the time of payment of the debt without the surety's consent, and any such extension, even for a few days and even though it appears to be beneficial to the surety, releases the surety from his obligation. In such a case, the only right of the surety affected is his right of subrogation, which is the right of the surety, after paying the debt, to stand in the shoes of the

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[2] Jackson v. Jackson, 7 Alabama, 791.

[3] Pratt v. Hedden, 121 Massachusetts, 116.

creditor and enforce the latter's right against the debtor. If the time is extended a month, for instance, and the surety pays the creditor as soon as the debt matures under the terms of the original contract, as he has a right to do, he cannot enforce the right of the creditor against the principal until the expiration of one month, thus delaying his right of subrogation for that period. This slight interference with the surety's right of subrogation is enough to discharge his liability to the creditor.

**§ 8. When suretyship relation is created by agreement among obligors.** Several parties may be bound as joint debtors and by agreement arrange that one of them is to assume the debt, thus making him the principal debtor as between the joint obligors. The liability of all these joint obligors to the creditor remains the same, and, until he knows that the relation of principal and surety has been created among them by agreement, he cannot be affected by it. But when a creditor knows one of several joint obligors, by agreement with the others, has become primarily liable and the others sureties for him, the rules of the preceding subsection apply; and, if the creditor extends the time of payment to the one who assumes the debt, the others will be thereby released. Thus, a partnership owed some debts and one partner withdrew from the firm, the other partners assuming all the firm debts. The new firm became bankrupt and the creditors of the old firm sued the retired partner, who pleaded that the creditors, knowing the new firm had assumed the debts, had extended time of payment to the new firm without his consent. The court held his liability as surety was discharged.[1] Cases similar to this, where the creditor has no part in the creation of the suretyship relation, arise where a purchaser of mortgaged land assumes the mortgage debt,[2] or where a leasehold is assigned, the assignee in both cases being the principal debtor—the one primarily liable for the debt—and the assignor the surety. If a transferee of mortgaged land does not assume the debt, the land is primarily liable, that is, is in the position of principal, while the grantor is surety. In such a case, an extension of time to the grantee of

[1] Rouse v. Bradford, (1894) Appeal Cases, 586.

[2] See Chapter VIII, Section 3.

the land to pay off the debt discharges the grantor from liability.[3] It suspends for a time the surety's right to pay the debt when due and then enforce the creditor's mortgage on the land.

**§ 9. Creditor taking forged or illegal note.** When the creditor, without the surety's knowledge, takes a new note which is forged and surrenders the old note, the surety is not released if the creditor did not know that the new note was forged,[4] perhaps because the creditor took the invalid note innocently by mistake, and the rights of the surety were not really prejudiced.

But, even here, if the surety knew a new note had been given but did not know it was forged, and, thinking he was discharged, did not make any move to assert his right, he would be discharged. A note, illegal because usurious, taken by the creditor in exchange for the old note, releases the surety on the old note because, in this case, the creditor must have notice of the illegality.[5] As a general rule we may say, that, when a creditor takes a new bond or note from the principal in exchange for the old one, a surety on the old instrument is discharged, if the new note or bond proves to be void or illegal and the creditor knew or should have known this fact; but not if the creditor acted in good faith and innocently. In the latter case, though he did an affirmative act prejudicial to the surety, he did it innocently.

**§ 10. Surrender of securities by creditor.** When a creditor has any security of the principal for the debt due him, he cannot release such security without discharging a surety for the debt, to the extent of the value of the security released.

**§ 11. Same: Reasonable conduct of creditor.** There is one limitation on the doctrine that a release of a security against the principal releases the surety pro tanto. When the creditor surrenders the security as a part of a reasonable business move, the surety is not discharged. The creditor may, therefore, exchange one security for an equivalent one, or he may compromise a disputed claim, or give up or surrender a security of no value. The surety is not in any way injured by such acts of the creditor.

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[3] Murray v. Marshall, 94 New York, 611.
[4] Hubbard v. Hart, 71 Iowa, 668.
[5] Moulton v. Posten, 52 Wisconsin, 169.

**§ 12. Subrogation of surety to creditor's rights.** Subrogation is an equitable right which a party who pays money at the request of or for the benefit of another has to stand in the shoes of the creditor and enforce the latter's rights against the party benefited. Under certain circumstances, the surety, after he has paid the debt of the principal, may be subrogated to the creditor's rights against the principal debtor. He cannot enforce his right of subrogation before paying the debt, as this would tend to injure the creditor. He may be subrogated to all the creditor's securities, equities, liens, remedies, and priorities against the principal, and is entitled to enforce them against the principal in a court of equity. The right is one given by equity and is independent of any contract. The surety ordinarily can exercise it only after he has paid the entire debt. As we have seen in subsections 6 and 7, the creditor must take care not to injure the surety's rights by any affirmative act, and any act of his which injures them will release the surety from liability. Hence any release of securities or extension of time will either destroy or suspend the surety's right of subrogation, in part at least.

**§ 13. Right to contribution.** If one co-surety pays the debt after the principal has defaulted, he has a right to contribution from the other co-sureties. This right of contribution, like subrogation, is not founded upon any contract between the co-sureties, for there is none; but it is founded on the principle of equity arising from the proposition that, when two or more sureties stand in the same relation to the principal, they are entitled equally to all the benefits and must bear equally all the burdens of the position. Hence, it does not matter that the several sureties were ignorant of each other's liability; they are entitled to contribution if they stand in the same position in respect to the principal, unless some have equities which give them an advantage over others.

## CHAPTER XIII.

## PARTNERSHIP.

### Section 1. Nature of a Partnership.

**§ 1. Definition of partnership.** A partnership is an association of two or more persons for the purpose of carrying on a business together and dividing the profits.[1]

The conclusion reached by the best recent authorities is that whether an association constitutes a partnership depends on the intention of the members at the time when the association was formed. The question is whether they intend to enter into the relation of partners:[2] that is, to form an association for the purpose of carrying on a business together as joint principals, and dividing the profits. The rule is, that, in determining whether the association or relation is a partnership, the test whether a man is a partner is, not whether he has actually received a share of the profits, but whether he has entered into an association formed for the purpose of carrying on a business and dividing the profits. The fact that a person shares in the profits, or that a mutual agency of the members is created, or that the members have a community of interest in certain property, or that each has a right to an accounting from the others, is simply a circumstance that tends strongly to show that the parties meant to enter into the relation of partners.

**§ 2. What definition implies: Mutual consent.** To have a

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[1] This is in substance the definition given in Reale's edition of Parsons on Partnership (4th ed.) p. 1, and is adopted in the codes of several states: Cal. Civil Code, § 2395; Mont. Rev. Civ. Code of 1907, § 5466; N. Dak. Rev. Civ. Code of 1905, § 5818; S. Dak. Civ. Code of 1903, § 1723. Many other definitions are given in Lindley on Partnership (2d ed.), 2-4.

[2] Parsons on Partnership (4th ed.) 47, § 54; Burdick on Partnership (2d ed.), 57.

partnership there must be an association. This implies that there must be an intentional association. The relation is created by the agreement of the parties, and cannot exist without their mutual consent. Persons may however be liable as partners who have not intended to form a partnership. In some states (though not all) persons who have intended to form a corporation, but have failed to comply with the legal requirements, if they proceed to carry on business, are held liable as if they were partners. And a person who allows himself to be held out as a partner by the members of an existing firm may be held liable as a partner, on the ground that, as to third persons, he has stopped himself from denying that he is one. But, in all such cases, the person is not held liable on the ground that he is a partner, because as to him there is no partnership really existing; he is held liable to the same extent as if he were a partner.[3]

**§ 3. Same: Purpose of doing business for share of profits.** The association must have been formed for the purpose of carrying on a business together. If Smith, Jones, Brown, and Robinson make arrangements for a joint trip to Europe for pleasure, or organize themselves into an association of amateur photographers, the relation thus formed is not a partnership relation. Hence an association to maintain a hose company for the public benefit is not a partnership.[4] But the members of such an association, although not partners, may be liable for debts contracted in their behalf by their authorized agent, or by one of the members in behalf of the others, or for injuries caused by an agent or employee while acting within the scope of his duties.

**§ 4. Determination of existence of partnership: Written agreements and acts.** It was stated in § 1, above, that the test whether a partnership exists is what was the intention of the parties at the time when they entered into their business relations. How is that intention to be ascertained? What their intention was is a question for the court or jury to determine. If the question arises whether two or more persons, who appear to have been jointly interested in a business transaction without

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[3] See Mechem, Elements of Partnership, § 3.

[4] Thomas v. Ellmaker, 1 Pars. Eq. (Pa.) 98, 111.

organizing any formal partnership, were really partners or not, this must be answered by ascertaining, as well as possible, what was their intention at the time they entered upon this transaction. In determining this question the court or jury will consider whether the parties agreed to share in the profits; whether they meant to become agents for each other, with authority in each to bind the others; whether they were to have the common ownership of some joint property or fund; and whether they have signed any papers or made any admissions tending to show that they intended to be partners.

If the parties have signed a written agreement, it is from this that their intention must be ascertained. If not, then their intention is to be determined from the evidence of their acts and statements. If A hires a hotel of B, and C sells goods to A, but his bill is not paid, and C then seeks to hold B liable for this debt contracted by A, on the ground that B is A's partner, and B says there was no partnership between them, the question whether there was a partnership depends on what they intended at the time of the hiring. If it was not intended that A should have authority to act for B, or that A and B should share in profits or losses, or be joint owners of the hotel, there is no evidence of a partnership. But if it was intended that A and B should run the hotel on joint account, sharing profits and losses, with authority to act in each other's behalf, then there would be evidence of a partnership, even if they both signed a paper saying that they were not to be partners.[5]

**§ 5. Same: Inconsistent evidence.** On the other hand, A, B, and C agree in writing that they will form a partnership to do business as a commercial agency, each owning one-third of the office furniture and supplies; but, during the first two years, A shall not take part in the business or share the profits or losses. A is not a partner during the first two years. The use of the word "partnership" in the written agreement does not necessarily make them partners, even though they thought they were all becoming partners immediately.[6] This case is not inconsistent with

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[5] Beecher v. Bush, 45 Mich. 188, 193-4.

[6] Sailors v. Nixon Jones Co., 20 Ill. App. 509, 513

the proposition that the test whether a partnership has been formed is the intention of the parties, because, although they intended in a general sense to form a partnership, their agreement shows that they did not intend, so far as A was concerned, to enter at once into the relations of a partnership. It is an instance where a written instrument, apparently intended to create an immediate partnership, was inconsistent with itself.[7]

**§ 6. Same: Not a mere "voluntary association."** It has been said in § 3, above, that an association not formed for carrying on a business and sharing the profits, such as an association of amateur photographers, is not a partnership. In a Pennsylvania case, after the presidential election of 1840, the Whigs of Pittsburg met at Irons's tavern and voted to hold a large dinner there to celebrate Harrison's election, appointing a committee of thirteen to make arrangements. The proprietor served a dinner, of which four thousand people of all political parties partook "with wonderful cordiality." The proprietor sued the committee for his bill. It was held that the committee were jointly liable, because they had concurred in giving the order for the dinner.

## Section 2. The Creation of a Partnership.

**§ 7. Classes of partnership.** Partnerships have been classified, with reference to the business they do, as trading and non-trading partnerships. A firm of merchant tailors is considered to be a trading partnership. Examples of non-trading partnerships are firms of attorneys, physicians, and publishers. A member of a non-trading firm has not implied authority to give a promissory note in the name of the firm. These are sometimes called partnerships of occupation.

Partnerships are also classified, with reference to the extent to which they include the activities of the members, into general, and particular or special partnerships. A general partnership is the usual kind, where the members contribute certain specific sums of money or property and their time, for the carrying on of one or more specific businesses. A special partnership is one

[7] See Mechem, Elements of Partnership, § 44.

formed for a single transaction or venture: if A and B, for instance, form a partnership to sell one issue of municipal bonds, or to send a particular cargo of goods to China for sale. A special or particular partnership is not the same as a limited partnership, although in a limited partnership the partner whose liability is limited is usually called a special partner.

If one of the members of a firm agrees to share his interest with an outsider, this creates what is called a sub-partnership. The effect is not necessarily to make the latter liable for the debts of the firm as one of its partners, though, if he becomes the real owner of the partner's share in the profits and assets of the firm, he will be liable as a partner since he stands in the ostensible partner's place.[1]

**§ 8. Classes of partners.** Suppose that in the firm of Brown, Jones, Smith & Robinson, wholesale meat dealers, Brown and Robinson are the men who do the active work of the firm. They are at the office daily, and make the contracts and see the customers. They are properly called the active partners. Smith comes down to the office occasionally, but does not take any real part in the business. He is not an active partner, but, like Brown and Robinson, he is an ostensible partner—that is, he is known and held out to the public as a member of the firm. Jones has withdrawn from active business, but leaves his capital in the firm and gets his share of the profits monthly. He is a silent partner. A fifth man named Peters is in a somewhat similar position; he has money invested in the firm, but takes no part in its business, though he receives his share of the profits. His name does not appear on the firm stationery, and he is not known to the customers to be connected with the firm. He is a secret partner. He may also be called a dormant partner. This term "dormant partner" would not be properly applicable to him, if he were a secret partner taking an active though concealed part in the management of the firm.[2] If Brown should later retire from the firm and cease to own a share in the capital, or be entitled to a share in the profits, but the other members should continue

[1] Burnett v. Snyder, 81 N. Y. 550, 553; Webb v. Johnson, 95 Mich. 325, 331.

[2] Burdick on Partnership (2d ed.) 79-82

to carry on the business, using Brown's name, Brown would be a nominal, as distinguished from a real, partner in the new firm. Special partners will be discussed under the subject of limited partnerships in Section 6, below.

§ 9. **Who may be partners? In general.** Partnership is a contractual relation, or, as some say, a status growing out of contract. It is based on an express or implied contract to enter into the relation which constitutes a partnership. Hence, in general, any person capable of making a valid contract may become a partner.

§ 10. **Partnership articles.** No particular form of words is required for a partnership agreement. The instrument usually begins by naming the signers and their residences, and stating that they "agree together as follows," after which there comes a series of numbered paragraphs or "articles," stating what shall be the firm name, business or businesses, the place of business, the date of beginning and duration or term of the partnership, the capital to be contributed, the share of each in profits, losses, and assets, the amount of time to be given by each partner to the business, the amount each may draw and at what intervals, and, frequently, provisions for retirement of a partner or dissolution of the firm, and the distribution of assets upon the dissolution.[3] Provisions are sometimes inserted for the admission of relatives or other persons in future as new partners. A common provision is to restrict the power of a single partner to sign notes for the firm, or to provide that no person shall sign or indorse a note or become surety on a bond for any person outside the firm. Such provisions are not valid against a person who becomes the holder of an instrument signed by a person contrary to the partnership articles, without notice of the restriction; but the partner who has violated the restriction may be liable to the others for so doing. Besides, such a restriction often proves a convenient excuse to give to unfortunate friends.

If the contract provides that the partnership is to begin at a future time, there is of course no partnership till that time comes,

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[3] Many precedents for partnership articles will be found in Jones's Forms in Conveyancing.

and the rule is the same where the partnership is formed without a written contract.

**§ 11. Liability to third persons as partners by holding out.** Suppose Brown and Jones, men of moderate means, engage in a clothing business with a small amount of capital. After some years of fairly successful business, they happen to employ Robinson, a young man of a rich family, who has large means of his own. Robinson, in going about as confidential clerk of the firm, contrives to give many people the impression, either by direct statements or by veiled hints, that he is a partner in the business. Walker, a clothing manufacturer, believing that Robinson is a partner, on the strength of his credit sells the firm a large bill of goods. Before this bill is paid the firm makes an assignment. Robinson is liable, jointly with Brown and Jones, for the whole debt, just as though he were a partner. Robinson is estopped as against Walker to deny that he is a partner in the firm, because he has held himself out to Walker as a partner.[4] A more frequent case is where a partner, whose name does not appear in the firm name, retires without giving notice of his withdrawal; persons selling goods to the firm think he is still a member, and, subsequently, when the firm fails, he finds to his cost that he is liable to these persons as if he had remained a partner.[5] So a person becomes liable by allowing his name to be used in the firm name, although really he is not interested in the business, but is simply a clerk.[6] Moreover, if Robinson does not himself represent that he is a partner, but allows Jones to introduce him to a customer as "Mr. Robinson of our firm" or "my partner, Mr. Robinson" he will make himself responsible to the customer as a partner. If Robinson has stood by and allowed himself to be represented as a partner without protest, the effect is the same as if he had made the representation himself.[7]

**§ 12. Same: "Partnership by estoppel."** There are obvious instances of a person's becoming liable as a partner by holding himself out, or permitting himself to be held out, as such. Clearly

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[4] Wallerich v. Smith, 97 Iowa 308. See Waugh v. Carver, 2 H. Bl. 235, 246.

[5] Carmichael v. Greer, 55 Ga. 116.

[6] Bartlett v. Raymond, 139 Mass. 275.

[7] Slade v. Paschal, 67 Ga. 541.

it is fair that a man who allows others to think that he is a member of a firm, and to do business with the firm in reliance upon his credit, should be held responsible to persons giving the firm credit on the faith of this supposition, and that he should be liable to the same extent as if he were actually a partner. This is sometimes called "partnership by estoppel." The subject is treated more in detail below (§§ 21, 33, 36).

The principle is the same as that doctrine of agency by which a person, who holds out another as his agent, is liable for the latter's acts, as if he were really the authorized agent of the former. The latter is not really the former's agent, but the former is held responsible because he has so conducted himself as to lead others to think so. It is just that he should now be estopped to deny that the other was his agent.

**§ 13. Firm name.** A firm name is not a necessary feature of a partnership. Where a partnership has a firm name, it is not bound to use it; the result will be the same, if all the partners sign in their individual names—and this they should do in giving a deed of real estate or bringing a suit. A deed to the firm should be made to the partners as individuals; it has been held that a deed to "D. B. Dorman & Co." did not convey to Binney, who was Dorman's partner.[8]

Apart from statutory restrictions a partnership may adopt any name the members choose. To prevent fraud, some states require that firms using a fictitious name, or a name that does not show the name of all the partners, must register the names of all members with the secretary of state or with the town or county clerk. Others forbid the use of a former partner's name without his consent or that of his executor. Others forbid the use of a name likely to be taken for the name of a corporation. The use of the firm name in a contract prima facie implies that the matter is a partnership transaction.

## Section 3. Rights and Liabilities of Partners Among Themselves.

**§ 14. Duty of good faith.** It is essential to the successful

[8] Gille v. Hunt, 35 Minn. 357, 360.

maintenance of the partnership relation that each partner should be able to rely upon the others' good faith. Each stands towards the others in a position of trust and confidence—a fiduciary relation—and this relationship imposes upon him the duty of exercising the same good faith that must be exercised by a trustee. If a large part of the business of a firm of attorneys is in the collection of certain claims of inspectors of customs, which are particularly in charge of one member, and this partner, by concealing the amount due the firm for fees in these cases, gets the other partner to sell out to him his interest in the firm at a low figure, this is a violation of his duty of good faith which will require the setting aside of the sale.[1] If Smith & Brown, sewer contractors, are promised a city contract for building a sewerage system, and Brown, who has charge of the negotiations, finding a hitch in getting the contract awarded, takes the contract in his own name without informing Smith, he will be declared to hold the proceeds of the contract as trustee for the joint benefit of Smith and himself.[2] If Brown buys property for the partnership, he cannot take a secret commission from the seller.[3] If he sells his own property to the firm, the sale will be fraudulent if he makes a profit without disclosing the facts,[4] and if he buys goods from the firm himself, without the consent of the others, the purchase may be set aside.[5] If the firm's lease is about to run out, and Smith goes to the landlord and renews it in his own name, this is a fraud upon his partner, and Smith will be declared to hold the lease as a constructive trustee for the benefit of the firm. He cannot demand an increased rent from his partners.[6]

**§ 15. Devoting time to the business.** Partnership articles should state whether each partner is to devote his whole time to the business of the firm. He may be a dormant partner, who puts in money but does not work. In the absence of agreement, he is not bound to engage in no other business, so long as he

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[1] Baker v. Cummings, 4 App. Cas. (D. C.) 230, 261.
[2] Miller v. O'Boyle, 89 Fed. 140.
[3] Emery v. Parrott, 107 Mass. 95, 100.
[4] Bentley v. Craven, 18 Beav. 75, 77.
[5] Nelson v. Hayner, 66 Ill. 487. See Latta v. Kilbourn, 150 U. S. 524, 541.
[6] Featherstonhaugh v. Fenwick, 17 Ves. 298, 311.

does not neglect the business of the firm.[7] But he cannot engage in a competing business; and if he does so he will be enjoined from continuing it, and made to account for the profits.[8]

**§ 16. Powers of the majority.** In the absence of agreement to the contrary, a majority of the partners have controlling power so long as they act in good faith. They cannot however admit new partners,[9] or expel a partner without cause,[10] or engage in a wholly different business, or a transaction radically outside the scope of the regular business of the firm,[11] without the consent of all.

**§ 17. Right to contribution or indemnity.** If the firm of Peters & Robinson incurs a bill for merchandise ordered by Peters, and Peters pays the bill out of his own money, he may compel Robinson to repay him half, although the payment exceeds the capital of the firm, provided it was within the scope of the regular business of the firm to incur this bill.

**§ 18. Division of profits.** In the absence of a provision in the articles of partnership, or an agreement, express or implied, on the subject, a majority of the partners may determine how the profits are to be ascertained, and how and when divided.[12]

**§ 19. Powers of partners as between themselves.** So far as their mutual rights and obligations are concerned, the powers of each partner to bind the firm may be regulated by mutual agreement. The members of the firm of Brown, Jones & Robinson may agree that Brown shall be the only member of the firm with power to sign checks or issue notes, Jones the only one authorized to buy goods, and Robinson the only one empowered to engage employees, or to take out fire insurance. Then if Jones signs the firm name to a check, or Robinson orders a bill of goods,

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[7] Parsons on Partnership (4th ed.) 197-8, § 53. Compare Burdick on Partnership (2d ed.) 327; Mechem's Elements of Partnership, § 113.

[8] Marshall & Co. v. Johnson, 33 Ga. 500, 506-8; and see Lockwood v. Beckwith, 6 Mich. 168, 173.

[9] Meaher v. Cox, 37 Ala. 201, 215.

[10] Wood v. Woad, L. R. 9 Ex. 190.

[11] Abbot v. Johnson, 32 N. H. 9, 19-20 (change to liquor business); Zabriskie v. Hackensack, etc. R. Co., 18 N. J. Eq. 178, 183 (dictum)

[12] 2 Lindley on Partnership (2d Am. ed.) 393-4.*

Jones or Robinson will be liable to the other partners for any damage caused by violating their agreement.[14] But it does not follow that third persons without notice of these limitations will be bound by them. The acts described are all by general usage within the powers of all members of a mercantile partnership; and, as to third persons, the test is whether the act was within the scope of the partnership business—which obviously depends somewhat upon the nature of the business.[15] The powers of partners to bind the firm as to third persons will be discussed in the next section.

## Section 4. Rights and Liabilities of Partners as to Third Persons.

**§ 20. Power to bind firm. Scope of business.** The power of a partner to bind the firm extends only to matters within the scope of its business. The liability of one partner for the contracts made or acts done by another in behalf of the firm exists because the other is his agent. An agent has power to bind his principal only by acts within the scope of his authority; and the scope of a partner's authority is determined by the nature of the partnership business. Obviously, if Brown and Jones are partners, this does not make Jones responsible for a new hat bought by Brown on credit, or for injuries inflicted by Brown in a quarrel with his next door neighbor. But not all questions of the liability of a partner for the acts of his associates are so easy of solution. What is within the scope of a partnership business depends upon the business. A partner in general has power to bind the firm by "any act necessary for carrying on the firm business in the ordinary way."[1] What is such an act is to be determined by the usual practice of people engaged in that business.[2] "A power to do what is usual does not include a power to do what is unusual, however urgent."[3] The emergency alone

[14] Stone v. Wendover, 2 Mo. App. 247 (agreement not to sign accommodation notes).

[15] Parsons on Partnership (4th ed.) § 115.

[1] Shumaker on Partnership (2d ed.) 182.

[2] Irwin v. Williar, 110 U. S. 499, 505-6.

[3] In re Cunningham & Co., 36 Ch. D. 532, 539; Hawtayne v. Bourne, 7 M. & W. 595, 600.

cannot create the authority, although authority may exist to do a thing in an emergency which is not authorized under ordinary circumstances. There is a marked difference between the scope of a partner's authority in a trading business and in a non-trading business. As to trade partnerships, especially, there are some fairly well settled general rules;[4] but even those are not of universal application; it is always a question whether the act was within the scope of the partnership in the particular case.[5]

**§ 21. Holding out. Actual and apparent authority.** The subject of liability as a partner by the principle of estoppel has been referred to above,[6] and it has been said that a person who is not a partner may incur the same liability as if he were one, if he holds himself out, or permits himself to be held out, as a member of the firm. A similar rule applies as to a partner's authority. One partner may be liable for the act of another partner, outside the scope of his authority, if he has held out the other as having authority to do that act.[7] The partners may, by a provision in the articles of partnership or by subsequent agreement, limit the authority of any member of the firm. Such an agreement will be binding among themselves, and the members will be liable for any violation of it. But as to third persons, who have no knowledge of the agreement, it is not actual but apparent authority that controls.[8] This is true in all cases in which the question arises as to whether a principal is liable for the act of his agent. If Brown and Jones are engaged in business as horse-breeders they may agree that Brown shall have no authority to warrant any horses sold, and Jones shall have no right to make any purchase exceeding a thousand dollars in amount. But if Jones buys a consignment of horses for two thousand dollars, or Brown warrants a horse that he sells for the firm to be sound and kind, both members of the firm are jointly liable for the

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[4] See §§ 23-26, below.

[5] Mechem's Elements of Partnership, §§ 161-2, 166; Burdick on Partnership (2d ed.) 183.

[6] §§ 11-12, above.

[7] Winship v. U. S. Bank, 5 Pet. 529, 561; Irwin v. Williar, 110 U. S. 499, 505-6; McPherson v. Bristol, 122 Mich. 354, 358, point 2.

[8] Banner Tobacco Co. v. Jenison, 48 Mich. 459, 462; Hoskinson v. Eliot, 62 Pa. St. 393, 400.

price, or for damages for the breach of the warranty, if the person with whom they were dealing had no knowledge of the want of authority, since such acts are within the usual course of business of a firm in that line of dealing.[9]

**§ 22. Same: Trading and non-trading partnerships.** It should be borne in mind that there is a difference between the implied or apparent authority of trading and non-trading partnerships. This is particularly true as to giving notes in the name of the firm. A member of a non-trading partnership, such as a firm of physicians,[10] or lawyers,[11] has no implied authority to do this; and the same rule has been applied to partnerships of farmers,[12] publishers,[13] tavernkeepers,[14] and others. A partner who does not approve of an act that his associate is intending to do may avoid liability for it by going to the third person and notifying him of his dissent.[15] If Brown does not approve of Jones' intended purchase of the horses, he may go to the seller and state that he refuses to be responsible for the purchase—unless, of course, the power to purchase horses is one expressly conferred by the articles of partnership.

**§ 23. Power to sell firm property: In general.** In a trading partnership, each partner ordinarily, as to third persons, has implied authority to sell any of the property of the firm. He has implied authority also to bind the firm by any act that is ordinarily incidental to the sale. Hence he has power, as above stated, to warrant the quality of the thing sold, and also to warrant that the firm has title to it, or that it is suitable for the purpose for which he sells it. He may warrant, for example, that a stallion "shall prove to be an average foal-getter."[16] A sale ordinarily implies a warranty of title to the property; and, if a partner sells property which the firm does not own, all the part-

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[9] See Sandilands v. Marsh, 2 B. & Ald. 673, 679; Fenn v. Harrison, 3 T. R 757, 760.

[10] Crosthwait v. Ross, 1 Humph, 23. See Smith v. Sloan, below.

[11] Smith v. Sloan, 37 Wisc. 285, 296.

[12] Ulery v. Ginrich, 57 Ill. 531, 533.

[13] Pooley v. Whitmore, 10 Heisk, 629, 635-8.

[14] Cocke v. Mobile Bank, 3 Ala. 175, 179.

[15] Leavitt v. Peck, 3 Conn. 124, 128-9.

[16] Edwards v. Dillon, 147 Ill. 14, 23.

ners will be liable for breach of this implied warranty.[17] This power to sell has usually been held to extend to a sale of all the property of the firm at once;[18] although there are cases which hold that this rule does not apply where the firm was organized for non-trading purposes, and where the property was to be kept for carrying on a particular business, such as horse breeding only,[19] or farming and cattle-raising.[20] Such instances, in case of a partnership of a kind that ordinarily involves trading in the things that the partner has sold, rest upon the purchaser's having express or implied notice that the partnership was for a non-trading purpose, or that there were limitations upon his authority to sell.[21] This power of each partner to sell goods of the firm which are kept for sale, or which are of a kind ordinarily kept for sale by such a firm, includes the power to give a chattel mortgage.[22]

**§ 24. Power to incur contract liabilities: In general.** A partner who incurs a debt, by the purchase of goods or otherwise, in the name of the firm, binds the other members, if the incurring of the debt was within the scope of his apparent authority, although he had no actual authority to make it, and even if he had been forbidden to do so, provided the seller or other creditor had no notice of his want of authority. Within the scope of his actual or apparent authority, he may bind the firm by a purchase on credit.[23] The scope of his implied authority, as stated in § 20, depends upon the scope of the business. A member of a dry goods firm would ordinarily be held to make the firm responsible for a purchase of silks, though not of a steam road-roller.

**§ 25. Same: Bills and notes.** One of the most well settled powers of a member of an ordinary trading partnership is to borrow money for the firm,[24] and it is equally well settled that

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[17] Hartley v. Rotman, 200 Mass. 372, 376.

[18] Ellis v. Allen, 80 Ala. 515, 518; Crites v. Wilkinson, 65 Cal. 559, 560 (under California code); Schneider v. Sansom, 62 Tex. 201, 202.

[19] Lowman v. Sheets, 124 Ind. 416, 418, 425.

[20] Cayton v. Hardy, 27 Mo. 536, 540.

[21] See Burdick on Partnership (2d ed.) 180.

[22] Hage v. Campbell, 78 Wisc. 572, 577.

[23] Dickson v. Alexander, 7 Ired. (N. C.) 4.

[24] Rothwell v. Humphreys, 1 Esp. 406.

he has power to give a promissory note or draft or bill of exchange in the firm's name for money loaned or goods purchased.[25] If he gave the note without the authority of his partners, and used the goods or money for his private purposes, the payee or any subsequent holder of the note can still hold the firm liable, if he took the note in good faith and without notice that it was not given for firm uses.[26] A member of a non-trading firm, such as a firm of real estate and insurance brokers, does not have this implied authority.[27] If Brown & Jones make a firm note payable to Brown, Brown cannot sue the firm upon it, because he can maintain no action against the firm at law; but if Brown sells it to a third person, indorsing it over to him, the indorsee may sue the firm upon it. And so if the note was signed by Brown in the name of the firm without Jones' consent.[28] A partner has authority to indorse in the firm name a note payable to the firm, and the indorsement will bind the firm, unless the holder has express or implied notice that the indorsement was for the maker's accommodation, or to raise money for the partner individually, or otherwise not for firm purposes.

§ 26. **Same: Sealed instruments.** A contract under seal, such as a bond or power of attorney or release, should be signed by the partners as individuals, with a separate seal for each. If one partner signs for the firm in the firm name, the question arises whether his signing binds the firm. On this point there is much apparent conflict among the cases. The strict common law rule was that a partner had no implied authority to bind the firm by an instrument under seal.

In taking a deed of real estate, particularly, the purchaser should see that the deed is signed by all the partners, or that express authority given to one to sign for the others is clearly shown. The deed should not be signed in the firm name.

§ 27. **Firm debts are debts of each partner.** If the retail firm of Jones & Brown owes the Smith Manufacturing Company

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[25] Pinkney v. Hall, 1 Salk, 126; 1 Ld. Raym. 175.

[26] Redlon v. Churchill, 73 Me. 146, 149.

[27] Lee v. Fort Scott Bank, 45 Kans. 8.

[28] Haldeman v. Middletown Bank, 28 Pa. St. 440. This assumes, of course that the holder did not know that Brown signed the note for his own purposes

for supplies furnished, and Brown also owes the butcher for meat, Brown's meat bill is not, of course, a debt of the firm; it is merely an individual debt of Brown's. But the debt to the Smith Company is not merely a debt of the firm; it is a personal debt of Jones and Brown individually and separately. For the purpose of bringing suit, however, firm debts and contractual obligations are said to create (apart from statutes to the contrary) a joint liability—not a several liability, or a joint and several one.[29]

**§ 28. Liability for torts: In general.** The liability of partners for torts, however, is joint and several. If the firm becomes liable for a tort—that is, for a wrongful act independent of contract—the injured person need not sue all its members jointly, as he must for a breach of contract; he may sue any of its members who are liable for the tort.[30]

**§ 29. Same: For negligence.** If one of two partners in the grocery business is driving a team and runs over a man, or one of a firm of stevedores injures a man while working in unloading a vessel, both partners are equally liable; and suit may be brought against either the one who did the act, or against his absent partner alone, or against both.[31] This rests upon the principle of the law of agency that a principal is liable for the act of his agent or employee or servant within the scope of his authority. Each partner being the agent of all the others, all are liable for his negligent acts, if they were within the scope of the business. This rule covers other negligent torts besides personal injuries. If Brown & Jones are newspaper publishers, and Brown, in Jones' absence, publishes a false statement that a minister ill-treated his children, Jones will be liable jointly and severally with Brown. The same rule should apply if Brown thinks a clerk has been stealing the funds of the firm, and, without probable cause, mistakenly procures his arrest.

**§ 30. Same: For fraud.** The same rule applies to fraudulent torts as to negligent ones: if the fraudulent act of one partner was done for the benefit of the firm and was within the scope

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[29] Burdick on Partnership (2d ed.) 152.

[30] Blyth v. Fladgate, [1891] 1 Ch. 337, 353; Wood v. Luscomb, 23 Wisc. 287, 290.

[31] Wood v. Luscomb, above; Linton v. Hurley, 14 Gray (Mass.) 191.

of its business, all the partners are liable. It is no answer to say that the partner was not authorized to commit a fraud, if the act which he did fraudulently was an act within the scope of the business.[32] Suppose Brown & Jones are a firm of lawyers, and make it a part of their business to invest money for their clients under specific instructions. A woman brings in five thousand dollars to invest in a particular mortgage, about which she has talked with Brown. Brown takes the money and uses it for speculations of his own. In such a case, Jones may be liable to the client, though he never saw or heard of her.[33] But ordinarily, in cases of the misapplication of trust funds, the money is not received by the firm in the course of its business, and, hence, the innocent partner is not liable, even if the money is used for firm purposes without his knowledge.[34]

**§ 31. Liability for crimes.** A criminal act, committed by one partner without the authorization of the others, does not ordinarily make the others criminally liable. Except under special statutes or in peculiar cases, no person is punishable for crime unless he had a criminal intent.[35]

**§ 32. Liability for acts of agents and employees.** Like any other principals, the members of a partnership are liable for the acts of their agents and employees, within the scope of their actual or apparent authority. If the firm's buyer orders goods, or if its teamster runs a man down in the street, the partners are responsible, as much as if they had done the thing themselves, provided that the employe was acting on the firm's business. See Chapter II, Section 9.

**§ 33. What partners are bound?** The general rule is that all members of a firm are liable for the acts of any partner or employee, within the scope of his actual or apparent authority. They are jointly liable on his contracts, and jointly and severally liable for his torts. They are not ordinarily criminally responsible for his criminal acts. This liability binds dormant,

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[32] Morehouse v. Northrop, 33 Conn. 380, 389; Banner v. Schlessinger, 108 Mich. 262, 264.

[33] Shumaker on Partnership (1st ed.) 315-16, and English cases cited.

[34] Gilruth v. Decell, 72 Miss. 232, 234-5; Englar v. Offutt, 70 Md. 78, 90.

[35] Watson v. Hinchman, 42 Mich. 27, 29.

secret, nominal, or special partners, as well as the ostensible members of the firm. If Jones, of the clothing firm of Smith, Brown, Jones & Robinson, buys an order of goods from Thompson, Thompson supposing him to be acting for himself alone, and later Thompson finds out that Jones was a member of this firm and bought the goods for it, Thompson may hold all the partners liable for the price, as undisclosed principals. It makes no difference that Thompson charged the goods to Jones personally, unless, after finding out about the firm, he has definitely elected to charge them to Jones. See Chapter II, § 98.

§ 34. **Extent of liability.** Aside from special partners in limited partnerships, each partner is liable for the whole of a debt, and for all the damages for a breach of contract or a tort. The partner who, voluntarily or involuntarily, pays the debt or the damages for breach of contract, has a right of contribution against each of the others for his proportionate share. The question whether a partner, who satisfies an obligation incurred through a tortious act on his part, may claim contribution from the others is one of some difficulty. The general rule is that he may, if the act was not wilful or exceptionally negligent. If he pays a judgment for personal injuries caused by the acts of an employee, he may of course claim contribution.

§ 35. **Assuming prior obligations.** If Brown & Jones take in a new partner, Smith, is Smith liable with the others to a man who has sold the firm a bill of goods a month before he became a member? Ordinarily he is not. If he agrees to assume part or all of the debts of the old firm, he is liable to his partners if he fails to pay his share of them; and in some jurisdictions he becomes liable directly to the creditor, if the debts he agreed to assume definitely included that creditor's claim. This latter result rests upon a doctrine in contract, by which a beneficiary of a contract may often sue on it. See Chapter I, §§ 58-60.

§ 36. **Liability after retirement or dissolution.** Whether an outgoing partner is responsible to future creditors of the new firm formed by his former associates after his retirement, depends upon whether he still permits himself to be held out as a partner. To escape liability, a retiring ostensible partner should give notice of his retirement to all persons who have had deal-

ings with the firm, and also notify, by publishing a newspaper notice or in some other way, the public who have had knowledge of his membership in the firm, though not dealings with it.

### Section 5. Termination of Partnership.

**§ 37. Dissolution by operation of law.** A partnership may be dissolved in three ways: By act of the parties, by operation of law, and by order of court.

Dissolution by operation of law occurs (1) by the death of a partner; (2) by a partner or the firm being adjudged bankrupt or insolvent; (3) by the business of the partnership ceasing to be lawful.

**§ 38. Same: In detail.** The death of a partner immediately dissolves the firm, just as the death of a principal terminates the authority of an agent. As to real estate owned by the partnership, the share of the deceased partner at common law passes to his heirs, subject to a trust in favor of the partnership until the partnership debts are paid. This rule has been changed by statute in some states. Provisions in the partnership articles for the continuance of the business after a death create a new partnership at that time, and do not actually continue the old one. The executor of a partner cannot be compelled to take advantage of a provision authorizing him to take the partner's place upon his death. An adjudication of the bankruptcy of one partner, under a national bankruptcy law, or of his insolvency, under a state insolvency law, dissolves the partnership, though no notice to creditors be given. If the firm executed an assignment for the benefit of creditors, this operates as a dissolution. If one partner makes a general assignment for the benefit of creditors, the effect in most jurisdictions is the same. If the business becomes unlawful, the effect is to terminate the partnership. A statute making the business of stock-brokerage illegal would probably dissolve all existing firms of brokers.

**§ 39. Notice of dissolution.** Except where a partnership is terminated by operation of law, as by death, war, or an adjudication of bankruptcy or insolvency, it is important that notice of dissolution should be promptly given. Notice should be given even where the partnership has been declared dissolved by a

decree of court.[1] The necessity of giving notice, in order to terminate the liability of a retiring partner to persons who continue to deal with the firm without knowledge that he is no longer a member, has been pointed out in the preceding section.[2] As there stated, it is necessary to give actual notice in some way, orally, by telephone, or by mailing a notice which is actually received, to persons who have actually had dealings with the firm, and constructive or general notice, usually given by publication, to the public who had knowledge of its existence. What notice is sufficient to discharge a retiring ostensible partner from liability, depends on the nature and extent of the business, and the local usage as to giving such notices.[3]

### Section 6. Limited Partnerships.

**§ 40. Nature of a limited partnership.** A limited partnership is one in which certain members, known as special partners, are not liable for the obligations of the firm in tort or contract, except to the extent of the capital they have put in. At common law, all partners are responsible for all the debts and other liabilities of the firm. Limited partnerships, the conception of which is borrowed from the civil law, are wholly founded upon statutes.

**§ 41. Statutory requirements.** The statutes of the various states regulate strictly the conditions under which a limited partnership may be formed. Many states require the recording of a certificate setting forth the names and residences of the partners, and the amount each contributes to the capital. Most states require publication of either the certificate or a notice. The special partner's contribution, which must usually be in cash, must be actually paid in before business is begun. In some states the special partner's name must not appear in the firm name, nor must the words "& Co." be used. In others a sign

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[1] Mechem's Elements of Partnership, 164, § 260.

[2] § 36, above.

[3] Compare Solomon v. Kirkwood, 55 Mich. 256, 260-1, point II, with Citizens' Bank v. Weston, 162 N. Y. 113, 120; Lovejoy v. Spafford, 92 U. S. 430, 440.

must be posted stating the names of the general and special partners.[1]

**§ 42. Effect of non-compliance.** The statutory requirements must be substantially (or, some cases hold, strictly) complied with, or all the members will be liable as general partners. In general, except for the limited liability of the special partners, the law of limited partnerships is the same as that governing other partnerships.

**§ 43. Dissolution and notice.** Where the certificate or notice, as usually is required, states the duration of the intended partnership, the partnership expires at the end of that period, and notice of dissolution is not necessary. If continued after this period without renewal by a fresh publication, the special partners become liable as general partners.

## Section 7. Joint Stock Companies.

**§ 44. Organization: At common law.** In an ordinary partnership, each member of the firm has a right to say who shall be the other members, and any introduction of a new partner dissolves the firm. This right may be limited by the articles of partnership, which sometimes provide, for example, that a partner may have a son admitted as a member of the firm on his attaining a certain age.[2] This consent to a substitution of partners may be given in general terms; and hence partnerships with transferable shares, sometimes called joint stock companies, may be organized. Such partnerships are in many ways like corporations, often having elaborate articles of organization, and by-laws providing for the management of the business by officers elected by the members, who vote according to the number of shares they own. Such organizations exist at common law in some of the New England states, where they frequently are known as "real estate trusts," being used chiefly for the management of office buildings and other city property. The money subscribed is spent in the purchase of land and the erection of

[1] For a detailed analysis of the statutes of all the states, see George on Partnership, 423-497, §§ 189-230.

[2] See Jones's Forms in Conveyancing (5th ed.) 612-3.

buildings, the legal title to which is held by a board of trustees, subject to the direction of the stockholders. The formation of such trusts sometimes raises difficult questions as to their validity under the rule against perpetuities and the rules against restraints on alienation. It should be expressly provided that the death of a member or the transfer of his shares shall not effect a dissolution.

**§ 45. Same: Under statutes.** In some states the formation of such organizations is regulated by statute, and there may be thus created an organization which is neither a "voluntary organization," a partnership, nor a corporation, but has some of the characteristics of each. Unless the statute expressly so provides, however, the liability of each shareholder for partnership torts, debts, and other obligations is unlimited, and in general the ordinary principles of partnership law control. The attempt is sometimes made to restrict the shareholders' liability by inserting in the articles of association, and in each contract, a provision that the person contracting with the association shall look only to the funds in hand for payment. The English joint-stock company, a limited liability association, organized under statutory authority and required to use the word "limited" as part of its name, is not properly a partnership, but is very similar to the American corporation. In England the word "corporation" is usually applied only to municipal corporations and to certain long established guilds and other companies.

## Section 8. Uniform Partnership Act.

**§46. Purpose.** A uniform partnership act has been drafted and was submitted to the states for adoption. When generally adopted, it will standardize the legal relations of a partnership. The following states and territories have adopted the act: Alaska, California, Colorado, Idaho, Illinois, New Jersey, New York, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Virginia, Wisconsin, and Wyoming.

## CHAPTER XIV.

## PRIVATE CORPORATIONS.

### Section 1. General Nature of a Corporation.

**§ 1. Definitions.** A private corporation may be defined as an association of persons to whom the state has offered a franchise to become an artificial, juridical person, with a name of its own, under which they can act and contract, and sue and be sued, and who have accepted the offer and effected an organization in substantial conformity with its terms. There are three leading ideas in the definition of a corporation, each of them being important in certain circumstances. These ideas are: A person—"a corporation is an artificial being, invisible, intangible, and existing only in contemplation of law"; a collection of persons—a corporation aggregate is a "collection of many individuals united into one body, under a special denomination, having perpetual succession in an artificial form, and vested by the policy of the law with the capacity of acting in several respects as an individual"; a franchise—"a corporation is a franchise possessed by one or more individuals, who subsist as a body politic, under a special denomination, and are vested by the policy of the law with the capacity of perpetual succession and of acting in several respects, however numerous the association may be, as a single individual."[1]

**§ 2. Corporation and partnership.** These differ: (1) In creation: corporations can be created only by express authority of the state; partnerships, by mere contract of parties. (2) In franchise: a corporation has at least one franchise, a partnership none. (3) In management: a corporation is managed only

[1] 2 Kent, Commentaries, 257.

through its duly appointed officers and agents; in partnerships, each partner or member can act for the partnership. (4) In powers: the corporation can lawfully exercise no powers except those expressly conferred or necessarily implied from those granted; these cannot be enlarged except by the state's consent; the members of a partnership may do anything lawful that they agree to. (5) In duration: the corporation is perpetual unless expressly limited; the death, resignation, or insolvency of members does not dissolve; but either of these dissolves a partnership. (6) In ownership of property: the title to the corporate property is in the corporation; that of the partnership, in the members of the partnership—they are all considered part owners. (7) In litigation: a corporation sues or is sued in its corporate name; the partnership, in the names of its members. (8) In transfer of interest: the transfer of his interest by a member has no effect on corporate existence; but a transfer of interest dissolves a partnership. (9) In liability of members: in absence of statute, a member of a corporation is not liable beyond the amount to be paid for his shares; but in partnership, there is an individual liability to the extent of its debts.

**§ 3. Corporation and fraternity or stock exchange.** An unincorporated society resembles a partnership more nearly than a corporation; it is not a legal entity, and hence those who claim to be agents of such an institution bind only themselves and those who authorize them to act. The members are not authorized to act for one another as in partnerships.

**§ 4. Syndicates.** These are in fact temporary partnerships organized for a particular transaction, such as to purchase or subscribe for a large amount of stock in a corporation to be formed, so as to insure the completion of the proposed scheme. As soon as the special transaction is completed, the syndicate is terminated. They are substantially partnerships.[2]

**§ 5. Corporations and state institutions.** There are in many states, state universities, asylums, penitentiaries, etc., managed by boards created by law, and appointed by the governor or elected by electors. These are frequently called corporations of

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[2] 5 National Corp. Rep. 455; 8 Q. J. Econ. 98.

a public kind; while in other states they are not so considered, although they have some corporate powers. They are, in such states, called state institutions, and are subject to modification at the state's will without violation of the constitutional prohibition against impairing the obligation of contracts.

## Section 2. Creation of Corporations.

**§ 6. In general.** A corporation is created through the joint act of the state and individuals, usually designated incorporators or promoters; these apply to the state for the privilege of becoming incorporated themselves, or of creating a corporation out of other individuals, or a group or association of other individuals or corporations. After permission is given, these promoters organize or provide for the organization of the corporation; their functions then cease; the members or subscribers contribute the capital, elect directors and officers, and take general control of corporate affairs; the directors and officers then start and keep in operation the ordinary powers of the corporation.[1]

**§ 7. Where to incorporate.** In the absence of express statutory requirements, incorporators do not need to reside in the state in which they seek to be incorporated. So also, under the rules of comity that obtain throughout the United States, a corporation formed under the laws of one state is permitted to do business in another state. In some of the states the incorporation laws are much more liberal than in others, and confer much more extensive powers. In fact, many states have so liberalized their corporation laws as to be fairly open to the charge of bidding for the fees arising from incorporation. Business men generally prefer to incorporate where they can secure the broadest powers, be hampered least, and be required to give as little information to the public as possible. It has therefore become customary to inquire, "Where is the best place to incorporate for certain purposes?" The so-called liberal or desirable states, for one reason or another, are generally stated to be: Arizona, Connecticut, Delaware, District of Columbia, Maine, Massachusetts,

[1] 1 Cook, Stock and Stockholders (3d ed.), par. 2.

Nevada, New Jersey, New York, Porto Rico, South Dakota, and West Virginia.

The points to which attention and comparison are usually directed are: Whether part or all of the incorporators or directors must be residents of the incorporating state; whether there is a maximum or minimum limit to the capital stock, and a limit to corporate indebtedness; what part of the stock is required to be subscribed, or paid in, before doing business; whether stock can be paid for in property or services, and, if so, whether, in the absence of actual fraud, the judgment of the directors as to the value of the property taken in payment of stock is conclusive, or only prima facie sufficient, or whether the matter is for the court or jury to determine; whether the shares may be issued with preferences or not; whether the shareholders' or directors' meetings must be held within the incorporating state; whether the shareholders are authorized to vote by proxy, or to cumulate their votes; whether there is any statutory liability upon shareholders or directors for debts of the corporation, or for failure to make certain reports; whether directors are liable for paying dividends out of the capital, or whether shareholders are liable for receiving such dividends, not knowing they have been so paid out of the capital; whether a transfer of unpaid shares releases the transferror; whether the records, minute-, account-, and stock-books must be kept within the state, and be open to inspection of shareholders or public officers; whether annual reports as to names of officers, directors, shareholders, and details as to paid up capital, debts, and operations are required; whether the corporate property, surplus, and franchise are subject to tax, and if so how; whether shares are taxed to the shareholders also, and whether they are subject to an inheritance tax; what are the powers as to consolidation, leasing and selling property, and holding its own shares or shares in other corporations; can material amendments be made without unanimous consent; can directors prefer themselves as creditors; are directors liable only for gross negligence, or must they exercise the reasonable care of competent business men in the management and control of the corporate business; what are the organization and filing fees; are the provisions of the law under which it is proposed to incorpo-

rate plain and clear, and have the courts passed upon their meaning.[2]

It will be readily seen that the foregoing questions and others like them require the careful attention, comparison and advice of a competent attorney before any definite conclusion can be reached. Sometimes it is considered desirable to incorporate in a foreign rather than the domestic state, or the reverse, so that suits may or may not be brought or removed to the Federal courts.

§ 8. **The association agreement. Its necessity and nature.** Since a corporation aggregate is composed of more than one person, the organization of which is not thrust upon any one, some association of a contractual character necessarily precedes, accompanies, or results from, the formation of a corporation; it need not be, though it usually is, a formal or written transaction, and sometimes it is very complex and intricate. Its general nature, however, is an agreement by each associate with his fellows to organize for the purpose contemplated, and to contribute his proportion of the funds agreed, the consideration being the mutual promises of the parties.

§ 9. **An agreement to subscribe for stock** in a corporation to be formed in the future, contemplates a subscription upon the books of the company after they are properly opened; the person does not by such an agreement, become a member, nor can the corporation enforce the subscription. Where T signed a paper agreeing "to subscribe the sum set against our names, when the books may be opened for subscription"—$3,000—and T refused to subscribe when the books were opened and he was notified, T could not be held as a member and be liable for the whole amount of the stock, but only for such damages as the corporation could show it had suffered by T failing to subscribe as agreed.[3]

§ 10. **Subscription to promoter or trustee.** If made to a statutory promoter, as a commissioner or incorporator, it is a binding contract from the time of making; if made to a self-constituted

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[2] See Mechem, Modern Law of Corporations, 2 Vols. 1908; Corporation Manual with Forms 1907-8; Frost, Incorporation (3d ed.) 1908; Clephane, Business Corporations.

[3] Thrasher v. Pike Co. R. Co., 25 Ill. 393.

trustee, who is to organize the corporation, deliver the subscription list to the corporation, and deliver certificates of stock to the subscribers, it is a binding contract between the promoter and subscribers, in accordance with its terms, from the time it is made; he has a right to enforce it, if he performs his part; and when it is delivered to the corporation and accepted by it, the corporation can enforce it.

§ 11. **Underwriting.** This is a form of subscription entered into before subscriptions are called for from the public, whereby, for an agreed commission or profit, the underwriters undertake to take all the shares, except what the public subscribes for after the books are regularly opened and subscriptions called for. If properly drawn it is an enforceable contract from the time it is made.

§ 12. **Conditional subscriptions.** Subscriptions may be upon conditions: (1) Express or implied; (2) precedent or subsequent; (3) before or after incorporation; or (4) the delivery of the subscription may be conditional.

§ 13. **Express and implied conditions.** Express conditions may be found either in the subscription, or in the statutes relating to subscription; the former may be of infinite variety, if not inconsistent with the charter; the most usual condition found in statutes is that payment of a certain amount shall be made at the time the subscription is made; if such subscription is made before incorporation, two views are taken as to the necessity of payment under such a statute—one that it is necessary, and failure to pay makes the subscription void; the other (supported by the weight of authority) is that such provision is meant for the benefit of the corporation only, and it may waive it if it chooses. The principal implied condition attaching to subscription at common law, is that no one can be called on to pay anything to the corporation for carrying on its business until the whole amount of stock agreed upon is fully subscribed.

§ 14. **Conditional subscriptions prior to incorporation.** If these are necessary for purposes of organization, two views are held: The New York view, that they are entirely void, and cannot be counted; and the Pennsylvania view, which holds the condition to be void, and the subscription absolute, unconditional and

valid, so it may be counted as one of the necessary subscriptions. If such conditional subscriptions are not necessary for organization, in either state they would probably be held valid according to their terms.

### Section 3. Powers and Liabilities.

**§ 15. Doctrine of ultra vires acts. Meaning of term.** Ultra vires literally means "beyond the powers"; in its application to corporation law it means beyond the authority of the corporation —the corporation may have the power but not the rightful authority to do the act; and, since there is no authority to do the act, there is no authority to ratify it, even if all the shareholders should consent. The doctrine is now confined almost exclusively to contracts, and is not applied in the law of torts.

**§ 16. As to executed contracts.** Ultra vires contracts, wholly executed by both parties, will not be disturbed on complaint of either; the court will generally leave the parties as it finds them; yet not always so, for, under some circumstances, it may help one party to secure payment or possession of property parted with under an ultra vires agreement. Thus, where a person granted land by a deed delivered to a corporation having no authority to take the land, but which did, nevertheless, and paid in full for it, the grantor could not repudiate his deed and recover the land.[4] So where a corporation, without authority to acquire or deal in lands, deeded land to the defendant, who paid one-third of the purchase price and refused to pay the balance, the court enforced full payment;[5] so, where a corporation without authority to form a partnership, did so, and placed its real property in the partnership, the corporation could withdraw and, after demand and refusal to deliver, could bring suit for unlawful detention of its property;[6] but a court of equity will not annul an executed ultra vires lease upon application of the lessor.[7]

**§ 17. Executory contracts.** Ultra vires contracts wholly

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[4] Long v. Georgia Ry. Co., 91 Ala. 519.
[5] Fayette Land Co. v. L. & N. R. Co., 93 Va. 274.
[6] Mallory v. Hanaur Oil Works, 86 Tenn. 598.
[7] St. Louis, etc. Ry. Co. v. Terre Haute & I. Co., 145 U. S. 393.

executory, that is, not performed by either party, may be repudiated by either party to the contract; in fact it is usually said to be the duty of either party to withdraw from them, and, when he does, no action for damages will lie and a court will not decree specific performance. Thus where J agreed with a corporation (which had no authority to subscribe for bonds of another company) to buy and sell such bonds on the joint account of himself and the corporation, and he did so, the corporation could not recover from J half the profits made by the purchase and sale.[8] On the other hand, where a party, together with a corporation having no such authority, became surety for a third party, the first party could not recover from the corporation one-half of the whole sum necessary to discharge the surety obligation, though it was fully paid by him.[9]

**§ 18. Partially executed contracts.** There are two general views as to the legal effect of such a contract; the rule in the Supreme Court of the United States and in several of the states, is that such a contract is absolutely void as a contract, and no action in any form can be maintained upon it.[10] However, if the person who has performed his part has parted with anything of value, that may be recovered from the other party in any form of action proper for such purpose. The other view, held by a number of the state courts, is that the person who has not yet performed his part, but who accepts or retains any of the benefits received from the other party, is thereby estopped from denying the validity of the contract, and consequently it is enforceable according to its terms by the other party.[11] Thus, where a corporation loans money without authority, taking a note therefor, it cannot maintain an action on the note by one view, and can by the other. So, too, where an insurance company, having authority only to insure against accidents in travelling, insured the plaintiff against accidents caused otherwise, although he had paid his premium and received his policy, he could not recover

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[8] Nassau Bk. v. Jones, 95 N. Y. 115.
[9] Lucas v. White Line, etc. Co., 70 Ia. 541.
[10] Central Trans. Co. v. Pullman Co., 139 U. S. 24.
[11] Bath Gas L. Co. v. Claffy, 151 N. Y. 24.

under his policy, by one view;[12] although by the other and more equitable, but less logical view, where a party was insured against destruction of his crops by hail, by a company authorized only to insure against destruction by fire or lightning, he could recover on the policy.[13]

**§ 19. Who may complain of ultra vires contracts?** (1) The state may if the public interest is injuriously affected; (2) the parties may, except as limited in the preceding subsections; (3) shareholders may enjoin the completion of an executory ultra vires contract, and, in some cases, if they act promptly, may have an executed ultra vires contract set aside;[14] (4) creditors cannot usually complain, but, where the ultra vires contract would, if performed, make the corporation insolvent, it has been held that the creditor can enjoin the performance or have it set aside.[15] Outside parties, although they may be in some way affected by the ultra vires contract, cannot enjoin its performance.

**§ 20. Liability for torts.** Corporations are liable for the torts of its officers, agents, and servants, substantially as the master is liable for the torts of his servant while engaged in the master's business, and, in this connection, the managers of the corporation are practically the corporation, the whole of the corporate duties being vested in them. Corporations have been held liable for damages from assault and battery, false imprisonment, libel, malicious prosecution, fraud and deceit, conspiracy, trespass, nuisance, negligence, etc. It has been said they are not liable for slander, because slander cannot be committed by an agent, but this does not seem right, and recent cases repudiate this view.[16] By the weight of authority, a corporation is liable for torts arising in a business that is ultra vires. They are liable for exemplary damages, as masters are for torts of their servants. See Chapter II, Section 7.

**§ 21. Crimes.** Corporations are held liable for crimes arising out of non-feasance or misfeasance, and also for criminal libel.

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[12] Miller v. Ins. Co., 92 Tenn. 167.
[13] Denver F. Ins. Co. v. McClelland, 9 Colo. 11.
[14] Elyton Land Co. v. Dowdell, 113 Ala. 177.
[15] Lothrop v. Stedman, 42 Conn. 583; Cole v. Iron Co., 133 N. Y. 164.
[16] Sugar Mfg. Co. v. Taylor, 130 Ala. 574.

There seems to be no good reason why they might not be held criminally liable for many other offenses, even for felonies of the higher grade, except that the criminal laws are strictly construed, and do not usually provide penalties that could be applied to them. There is a tendency to hold them liable for such crimes as may be punished by fines.

Corporations are liable for contempt of court as individuals are, and may be punished therefor by fines imposed upon them.

**§ 22. Liability of promoters.** Promoters are personally liable to one dealing with them, even though their dealing is in the name of the corporation, for the reason that there is in fact no principal in existence that they can represent. This liability perhaps can be excluded by drawing the contract in a way that makes the corporation alone liable, if any one.

**§ 23. Liability among themselves.** As between themselves, so far as they act in forwarding the scheme of incorporation in accordance with their agreement, they are substantially partners for the particular purpose, and one is bound by the acts of the others in carrying out the scheme in the way contemplated. But, as to the other matters, only those who authorize, consent, or ratify the acts of the others become liable therefor.

**§ 24. Liability of corporation for acts of promoters.** Inasmuch as the corporation does not come into existence until after the promoter's acts bring it into existence, it cannot be a party to a contract made for it by its promoter, and so is not liable thereon, unless it expressly or impliedly adopts the acts or contract after it has come into perfect existence. The adoption of a promoter's contract by the corporation is really making a new contract, which dates from the time of adoption and must be entered into with all the formalities then required to bind the corporation; and this is not properly termed a ratification, for that implies the existence of a principal at the time the agent makes the contract. See Agency, Chapter II, § 12.

### Section 4. The Corporation and Its Officers.

**§ 25. Board of directors and annual meeting of stockholders.** The general management of the business of a corporation is ordinarily placed in the hands of a board of directors, elected by the

shareholders, who in turn appoint the administrative officers, such as president, vice-president, treasurer, secretary, etc.

The general practice is to hold a stockholders' annual meeting for the purpose of electing directors and the transaction of other business. A stockholder who cannot be present at such a meeting should be represented by a proxy, which may be as follows:

PROXY.

Know all Men by these Presents, That I,

John Gardner

of Chicago, in the State of Illinois, do hereby appoint Walter Simpson of Chicago, in the State of Illinois, to be MY Substitute and Proxy, with power of substitution, for ME and in MY name and behalf, to vote at any election of the

Chicago Bridge COMPANY,

and at any meeting of the Stockholders of said company, as fully as I might or could were I personally present.

IN WITNESS WHEREOF, I have hereunto set my hand and seal, the seventh day of August 1937

Signed, Sealed and Delivered in Presence of

(Signed) Ruth Gardner

(Signed) John Gardner Seal

Seal

§ 26. **General rule as to duties of officers.** They owe the corporation the duty to exercise diligence and care and a reasonable business judgment and prudence in managing the corporate affairs, and, for failure in this direction, they may be held in an action for damages by the corporation; some cases say they are liable only for gross negligence in managing the corporate affairs, or selecting unfit servants, or failure to use ordinary care to supervise their acts afterward; they have no right to any profits made by them while working for the corporation; all such belong to it and may be recovered by it.

§ 27. **Rights of officers to manage the corporate business.** So long as corporate officers act in good faith, with due care, and keep within the corporate powers and those conferred upon them, they cannot be prevented from managing the business according to their best judgment, and neither shareholders nor the courts can interfere.

§ 28. **Right of officers to deal with the corporation.** The general rule here is that the officer cannot rightfully represent both himself and the corporation in making a contract with it; any such contract is voidable by the corporation or its members, even though in fact it was fair and reasonable, by one line of cases; [17] but by another and perhaps the better view, if the contract is made in good faith and free from fraud, it is not so voidable. If the corporation, however, is represented by other officers that have power to act for it in the transaction, there is nothing forbidding an officer from dealing with it, and such contract is valid. The same rule applies to corporations having common directors or officers dealing with each other through such officers; if they are represented by non-common officers who could bind it by their action, the contract is valid; otherwise voidable.

§ 29. **Right to salary.** The general officers of corporations, including directors, are supposed to serve in their capacities as such without compensation, and hence, after they have so acted, they cannot, without consent of shareholders, be voted salaries as back pay, for such a thing would be giving away the corporate funds. For any extraordinary service not included in the ordinary functions of the office, there is an implied promise to pay, and in such case the directors have the right to fix the amount. The shareholders usually reserve the right to themselves to fix the salaries of the general officers, and leave to the directors the right to fix other salaries. There is an implied promise to pay any officer or any person who devotes his whole time to the service of the company in ways other than merely performing the duties of his office.

§ 30. **Right of officers to deal with shareholders.** There is some conflict upon this matter. It is usual to say that directors

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[17] Munson v. Ry. Co., 103 N. Y. 58.

and officers do not stand in any relation of trust and confidence toward individual shareholders, and consequently can deal with them as if they were strangers, and are not obliged to give them any information, unless called for, that may affect the value of the shares, even though they seek to buy shares from such shareholders;[18] but there are some recent cases to the contrary, including a decision of the Supreme Court of the United States, reversing a decision of the Supreme Court of the Philippine Islands.[19] It was held here that the managing director of a church-landowning corporation, having shares, and whose lands were about to be purchased by the government at a price that would greatly enhance the value of the shares, was under a duty to inform a shareholder from whom he sought to purchase shares, of the facts known to him concerning the probable sale of land to the government.

### Section 5. Transfer of Shares.

**§ 31. Transfer of shares.** The ordinary certificate of stock usually says, "transferable in person or by attorney on the books of the corporation upon the surrender of this certificate." On the back, a blank form of assignment is usually present, reading, "For value received I hereby sell, assign, and transfer to ——————— all my interest in ——————— shares of stock represented by this certificate and I hereby irrevocably appoint ——————— my attorney to transfer the same on the books of the corporation, with full power of substitution"; when this is signed by the owner, the certificate will pass by delivery without filling in the other blanks, and any subsequent holder can fill in the blanks and have his name put on the corporate books as owner, and get a new certificate in his own name to that effect.[20] The right to transfer is an incident of the ownership of the property in the shares—and the corporation, unless the statute expressly allows, cannot prevent such transfer, although it may regulate it by reasonable provisions for the protection of the corporation. But at the time the subscription is made, the sub-

[18] Deaderick v. Wilson, 8 Baxter (Tenn.) 108.

[19] Strong v. Repide, 213 U. S. 419.

[20] Keller v. Mfg. Co., 43 Mo. App. 84.

scriber may, in some states, agree to offer his shares to the corporation or other members before selling to outside parties.[21] There is no right generally recognized in this country to transfer shares after insolvency, or to an incompetent or insolvent person for the purpose of evading liability.

§ 32. **Registration of transfer.** As between the corporation and the transferror or transferee, until the registration is made on the books of the company, the corporation may, until it is satisfied of the right of the transferee, recognize the registered owner. The above rule is of importance in the case of attaching creditors of the transferror. As between pledgor and pledgee, registration is unnecessary. But the pledgee, in order to prevent the possibility of loss, usually has the stock registered in his name. Where P indorsed his certificate of shares in blank and delivered it to B, his broker, to secure a balance of account of $3,000, and B, without authority, pledged the same shares by delivery of the indorsed certificate to a bank, to secure a loan of $8,000 to B, the bank, having no knowledge of the wrongful act of B, could hold the shares as against P, until the $8,000 loan was fully paid.[22] But, if instead of claiming to own the shares and borrowing for himself, B had represented he was P's agent and wished to borrow for him, and had pledged the indorsed shares to the bank as security, and, after securing the money, appropriated it himself, P could recover the shares and the bank would lose, since it relied on B's false representation of agency.[23]

§ 33. **Transfer upon forged power of attorney.** Since certificates of shares are not negotiable, this has no legal effect upon the rights of the original owner—he cannot be deprived of his property by forgery, unless he is chargeable with negligence. If the corporation accepts and cancels a forged certificate, and issues a new one in its place, a bona fide purchaser of the new certificate is protected, and, as against the corporation, may claim membership, unless the corporation has issued all the shares it can; but, if the corporation has issued all the shares it has a right to issue, the purchaser has an action for

[21] Barrett v. King, 181 Mass. 476.

[22] McNeil v. Tenth Natl. Bk., 46 N. Y. 325.

[23] Merchants' Bk. v. Livingston, 74 N. Y. 223.

damages against the corporation. The certificate is a continuing representation of the validity of the shares, when made to an innocent party; the original owner can claim the rights of membership; the forger or the person who induces the corporation to act is liable to it for any loss it sustains. The same rules apply to lost certificates not due to the fault of the owner. Thus, where a certificate was issued to D and by him sold and indorsed in blank to P, from whom it was stolen without his fault by an unknown person, who transferred it to brokers who sold it to M, P can recover the shares and M and the brokers must look to the thief.[24]

**§ 34. Transfers in breach of trust.** When A holds shares in trust for B, and there is nothing in the certificate or on the register to show that a trust exists, a bona fide purchaser from A gets a good title as against B, and B must look to A. If the certificate or register shows a trust exists, the purchaser takes it subject to the trust; if the corporation has knowledge of the existence of the trust and of any limit on the power of the trustee to transfer, and it negligently allows him to transfer contrary to his authority, the corporation is liable to the party injured.

**§ 35. Gift.** A gift of shares may be made by delivery of the certificate for that purpose, without indorsement. Registration is not essential to the validity of the gift, though perhaps the full legal title is not complete until indorsement on the certificate or transfer is made on the corporate books.

**§ 36. Effect of transfer.** The general rule is that the transferror is no longer a member, and is no longer in any way liable to the corporation or its creditors, even though the shares are not fully paid; the purchaser, on the other hand, assumes, if he has knowledge of the facts, all the obligations and is entitled to all the rights of the seller. If he has no knowledge that the shares were not paid up, in the absence of any statute to the contrary, he is not liable to the corporation or to its creditors—he has a right to presume they are paid up, though the certificate does not so state, and he is not obliged to inquire into the matter. In such case it would seem the transferror would remain

[24] East Birmingham Land Co. v. Dennis, 85 Ala. 565.

liable to the corporation, at least so far as necessary to protect creditors. The matter is regulated by statutes in many states.

### Section 6. Rights of Creditors.

**§ 37. Non-payment of shares.** Difficult questions arise as to the liability of shareholders who have an agreement with the corporation by which they are not to pay in full for their shares. Such agreements are valid as between the corporation and the shareholders, but are generally invalid as against creditors, so the creditor can require full payment for his protection.

There are four exceptions: (1) When the shareholder has purchased from another shareholder, in good faith, shares that were not in fact fully paid but which he supposed were, he is not liable to creditors for the unpaid amount. (2) When the corporation is in failing circumstances, but with the power to increase its stock, and it does this, under stress of circumstances and in good faith, to re-establish itself, it may sell such stock at its market value, or issue it as a bonus along with bonds issued, to tide over its difficulties; and those who take the stock or bonds or both, in good faith, at their market value then, will not be held to any further liability in favor of subsequent creditors. (3) It is held in New York and Illinois that a corporation like a railroad company may issue its shares below par, or at their market value, in payment of a construction company for the construction of its road, and such company is not liable to subsequent creditors for the difference between the face value of the shares, and the price at which they were taken. (4) In case shares are paid for in property, it is generally held that, so long as there is no actual fraud in valuing the property, whatever price it is taken at, even if it is an over-valuation, shall be final and creditors cannot complain; other states, notably Missouri, hold that any over-valuation, though made in good faith, must be paid back to the company by the person receiving the shares upon that basis, if necessary to pay creditors who have relied on the company's having the capital it pretends to have. Many cases also hold that an excessive over-valuation is prima facie fraudulent, and the discrepancy will be required to be satisfactorily explained, or made up. Perhaps good will is property with which shares can

be paid for, if it really exists in the particular case; and labor, services, patents, franchises, etc., are property within the rule.

§ 38. **Statutory liability of shareholders to creditors.** This is a liability placed upon shareholders, over and above their common law liability, for the protection of creditors; it is not generally a part of the corporate funds for the purposes of carrying on its business, but it is a security for creditors alone. The statutes usually specify only corporations organized for particular purposes.

## CHAPTER XV.

## INSURANCE.

**§ 1. Nature of insurance.** Insurance is essentially a contract or agreement, whereby one party, in consideration of a price paid by another party, guarantees to that other that he shall not suffer loss or damage by the happening of certain specified contingencies. In fire and marine insurance the principle is entirely that of indemnity. In no circumstances may the insured recover more, and he may recover less, than what he has actually lost. Since the value of a life cannot ordinarily be exactly ascertained, the doctrine of indemnity is not applied to life insurance.

**§ 2. Kinds of policies.** There are several kinds of policies. The most common form of fire policy is the open policy. In this the sum mentioned on the face of the policy merely fixes the maximum amount, beyond which the company is under no circumstances liable and in the event of a loss it is open to the company to show that the damage was in fact less than the amount stated in the policy. In the valued policy, on the other hand, the value of the property insured is conclusively agreed to by the parties and in the event of loss no question can be raised as to its value; the only question is: Did the loss occur? Marine policies are generally, and life and accident policies practically always, valued. The mere fact that the total sum mentioned in the policy is apportioned among several items does not render the policy valued. Thus, where the policy was for $8,500 on one brick and two wooden houses, and opposite the first item was placed the sum of $6,700 and opposite the latter item the sum of $1,800, the policy was held not to be valued but merely to show the maximum amount of recovery which could be had with respect to each item. A floating policy is one issued to cover goods in a definite place, but where the goods are constantly changing so that the

exact articles insured cannot be definitely described. This is frequently used in case of articles in warehouses and stores. This form of policy is also called a blanket policy.

A regular life policy is where the insurer, in consideration of certain premiums, agrees to pay a stated sum at the death of the person insured to whomever is designated in the policy. An endowment policy is where the premiums are paid for a certain number of years, generally ten or twenty. If the insured dies during that time, the face of the policy is paid to the designated person. If the insured lives to the end of the specified period, the face of the policy is paid to him.

**§ 3. Meaning of terms used.** Some of the more commonly used phrases in insurance law are the following: The person or corporation promising the indemnity is the insurer. The person taking out the policy and with whom the contract is made is properly designated as the insured, although the term is sometimes applied to the person to whom the policy is made payable, who of course may or may not be identical with the person taking out the policy. The person to whom the insurance is made payable is more properly designated as the beneficiary. A policy may under certain circumstances be transferred to a third person, who is then called the assignee.

**§ 4. Who may be an insurer?** At common law any person could become an insurer. Today practically all of the business of underwriting insurance is done by corporations, and in some states, by statute, only corporations can issue insurance policies. These insurance companies are usually corporations organized for that purpose as a business for profit. There are several so-called fraternal orders or mutual benefit companies. These proceed in somewhat different ways, and in some respects vary from regular insurance companies, but the law that governs them is substantially the same as that with regard to regular insurance companies.

**§ 5. Insurable interest.** If one who had no interest in the property insured could take out a policy upon it, since under those circumstances he would, in return for the payment of a comparatively small premium, stand to win a very much larger amount by the destruction of the property, it is clear it would be

for his interest that the property should be lost within the terms of the policy. To avoid this contingency it is obvious that, as a matter of public policy and protection of property, the right to insure must be limited to those persons who are so related to the property, that, if it were not for taking out the policy, they would suffer a pecuniary loss by the destruction of it. This has occasioned the doctrine of requiring an insurable interest by the insured in the subject matter of the insurance. A person has been said to have an insurable interest in property "when he is so situated with reference to it, that, by its destruction, he will suffer an actual loss of money or legal right, or incur a liability."

**§ 5a. Life insurance: Legal obligation between parties.** A person has an insurable interest in the life of another person when, either because of a legal right or because of blood relation or marriage, there is a reasonable expectation of pecuniary advantage or gain from the continuance of the life. Illustrations of insurable interest resting on legal right are as follows: A creditor has an insurable interest in the life of his debtor, but the sum insured must bear some reasonable relation to the amount of the debt, present or expected; if the policy is for too large an amount it is void as being a gambling policy.

**§ 6. Same : Relation of blood or marriage.** Illustrations of the second kind of insurable interest in lives are husband and wife, and a sister supported or helped by her brother.

The same general doctrine of insurable interest exists in accident as in life insurance.

**§ 7. Assignees: Fire insurance.** If A, having a policy of insurance on his house, sells the house to B, this will not carry the policy to B, for insurance is a personal contract and is not regarded as an incident to the property, so as to pass with the transfer of it. This is one of the oldest principles in insurance law. Hence, if there is a fire after the sale by A to B, there can be no recovery on the policy. On the other hand, however, A may, when he sells the property to B, also assign the policy to B. Such an assignment requires the consent of the company, which should always be obtained.

## Section 1. Representations, Concealment, and Warranties.

**§ 8. Representation and concealment.** Because of the peculiar character of the contract of insurance, the most striking feature of it being the payment of a comparatively small premium, in return for which a disproportionately large sum may be obtained upon the happening of the contingency insured against, and because the facts with regard to the subject matter of the insurance are peculiarly within the knowledge of the applicant, the rule is enforced by the courts that the contract is one of the utmost good faith, "uberrimae fidei," on both sides. They consequently hold that it is the duty of the applicant for insurance, in answering questions and otherwise supplying information which is required by the company, to disclose fully to the underwriter all facts that might reasonably be likely to influence him in determining whether or not he will issue the policy. A concealment or misrepresentation of a material fact gives the insurer a defense to an action on the policy.

**§ 9. Same: Good faith not enough.** Where a definite question is put, mere good faith on the part of the applicant is not enough, if the answer is materially false. Thus, where the applicant stated, in answer to a question, that he already was carrying $200,000 worth of insurance, while he really only had $30,000, the policy was void for misrepresentation, even though the statement was made by an agent who honestly believed it to be true. And the general principle is that the insured is responsible for the acts of his agents, both as to concealment and misrepresentation.

**§ 10. Language of policy: Meaning of "shall be void."** All fire policies contain a large number of provisions regulating the character of the risk. The policy generally provides that it "shall be void"[1] if the insured shall do or fail to do the acts therein mentioned. Hence there can be no question that these requirements are warranties, upon the exact performance of which the validity of the policy depends.

**§ 11. Distinction between representation and warranty.** The difference between a representation and a warranty is funda-

[1] This is the New York standard form.

mental and far reaching, and must be constantly borne in mind. A representation is a statement leading up to the making of the policy, but not in itself a part of it. A warranty is an integral part of the policy, on the performance of which the validity of the policy depends. A representation need be only substantially correct, and it avoids the policy if false, only if it is so on a material point, that is, one that influences the company in underwriting the policy. A warranty must be exactly performed, and the question of its materiality makes no difference, since the parties have by their contract made it a part of the policy and a condition of its validity.

§ 12. **Express language of policy.** If the policy, life or fire, expressly says that the insured "warrants" certain things, or if the policy provides that it is a "condition" of it that certain things shall be as stated, or if it provides that the policy "shall be void" if certain things are done or not done, there of course can be no question. If the insured does not comply with these requirements, the policy by its very terms is void.

§ 13. **Same: Illustrations of language held a warranty.** In Fowler v. Aetna Insurance Co.,[2] the policy was executed on the stock in trade consisting of certain goods "contained in the two story frame house filled in with brick situated at No. 152 Chatham street." It appeared that the house was in fact wooden with hollow walls, and was not filled in with brick. The court instructed the jury that, irrespective of the question whether or not this was a material alteration in the risk, the policy was void because of the fact that the words "filled in with brick" were a warranty and had not been complied with by the assured. In the case of Burleigh v. Insurance Co.,[3] among certain incidental provisions and after the description of the property, there appeared this statement: "all contained in the frame storehouse with slate roof, . . . detached at least 100 feet, on the east side of Lake Champlain, in the town of Shoreham, Vermont." It appeared that at the time the policy was issued there was a small building about 75 feet distant from the storehouse. The court held that

[2] 6 Cowen (N. Y.) 673.
[3] 90 N. Y. 220.

the statement "detached at least 100 feet" was a warranty. They said: "We cannot hold it to be a mere description of the building for the purpose of identifying that personal property insured contained within it. The phrase is not adapted to any such purpose. It adds nothing to the identity of the storehouse already sufficiently described by its ownership and situation on the lake." In Stout v. Fire Insurance Co.,[4] the policy purported to be "on the five story brick building known as the Lawrence block, occupied for store below, the upper portion to remain unoccupied during the continuance of this policy." In this case also, the court held that the phrase "occupied for store below" was in law a warranty, since it could not fairly be regarded as a mere collateral description of the building as it had already been sufficiently identified in other ways.

**§ 14. Promissory warranties.** A very important distinction that is to be noticed, with regard to warranties, is the question whether or not the warranty relates only to the state of affairs at the time of taking out the policy, or whether it is so worded as also to amount to a warranty that the general state of affairs shall continue in the future. Frequently this question may be definitely settled by an examination of the terms of the policy. If it is clear by the language that the assured binds himself as to future actions, there can of course be no question. Thus, where the policy contained the following clause: "The assured hereby agrees to keep twelve pails full of water on each floor of said mill during the continuance of this policy," the court held that the assured had clearly bound himself to future action, and, unless he did in fact continue to keep twelve pails as aforesaid, his policy was void. So, in a life insurance policy, where the policy contained the following statement: "I guarantee that I do not and will not practice any bad or vicious habits that tend to the shortening of life," it was held that the policy was void where it was shown that the insured several years after the taking out of the policy became intemperate to an excessive degree.

The requirements of the policies vary. For this reason it will not be possible to examine them all in detail, but the more im-

[4] 12 Iowa, 371.

portant ones of the New York Standard Fire policy may be taken as typical.

§ 15. **Other insurance.** Some forms of policies provide that the policy shall become void, if "the insured shall have or procure other insurance on the property covered by this policy." The purpose of such a provision is obvious. If the insured can take out several policies upon the same property, the chances for recovering more than the actual loss are greatly enhanced, and the moral risk for the same reason correspondingly increased, and it is to prevent this contingency that conditions against further insurance have been inserted in the policy. It is to be noted that there is no double insurance, unless the two policies cover the same interest. Thus, for example, a mortgagor and mortgagee may each take out insurance on the premises covered by the mortgage, without there being any double insurance.

§ 16. **Increase of hazard.** The New York Standard policy provides that it shall be void, "if the hazard be increased by any means within the control or knowledge of the insured." Thus, where the insured was the owner of a frame building, and, after a long season of extra dry weather, started in to have the building painted, and as a preliminary step began to burn off the old paint by means of a naphtha burner, which processes were kept up for four weeks while the dry weather still continued, the court found that the policy was void.

§ 17. **Employment of mechanics.** This clause: "If mechanics be employed . . . for more than fifteen days at any one time," is found in most fire policies. Under this clause, it makes no difference whether the risk was increased or not. The only question is whether the work continues for a longer time than that allowed by the policy.

§ 18. **Change of title.** If the policy provides against "change of title," it is none the less broken although the insured keeps throughout an insurable interest in himself, if in fact he actually parts with his legal title. Thus, a sale by the insured with an immediate mortgage back violates this clause.

§ 19. **Keeping or using dangerous articles.** Almost all policies forbid, in one form or another, the keeping or using of specific articles on the premises insured. The New York Stand-

ard policy provides that it shall be void "if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used or allowed on the above described premises" certain specified articles.

§ 20. **Vacancy and unoccupancy.** The New York Standard fire policy provides that it shall be void, if a building insured shall "be or become vacant or unoccupied and so remain for ten days."

§ 21. **Non-user of manufacturing establishments.** This clause is very similar in its nature and character to the clause last examined. The New York Standard policy provides that it shall be void "if the subject of insurance be a manufacturing establishment and . . . it cease to be operated for more than ten consecutive days."

§ 22. **Immediate notice of loss.** The New York Standard policy requires the insured after fire to give "immediate notice of loss to the company." In one case where there was no reason why the insured should not have immediately sent in his notice of loss, it was held that a delay of 48 hours was a violation of this requirement of the policy.

§ 23. **Proof of loss.** The language of the policy also requires "proof of loss to be furnished within sixty days after the fire." This being a definite fixed period must be conformed to by the insured.

§ 24. **Certificate of loss.** The New York Standard policy provides that the insured shall upon the request of the company "furnish a certificate of the magistrate or notary public . . . living nearest to the place of fire." The courts have held, as to this requirement, that the difference of a few feet would not violate the requirement, where both magistrates lived substantially the same distance from the place of fire. But if the magistrate whose certificate is obtained is substantially farther away, it does not satisfy the requirement. Nor is it any excuse that the nearest magistrate refused for any reason to give the certificate.

### Section 2. Same: Life Insurance.

§ 25. **Language of policy.** There is no such large number of conditions in life insurance as are found in fire insurance policies.

**§ 26. Time of payment of premium.** One clause of the life policy that should be examined at the present time is that requiring the premium to be paid on or before a fixed date. If this date falls on Sunday, the insured has until the following day to make his payment. The right of paying the agent of the company, if he can give a receipt properly signed, has been held to be merely a privilege extended to the insured by the company, with the consequent result that it is no excuse for non-payment that the agent did not let the insured know of the premium day. And it has also been held, although the decision is perhaps open to question, that if the local agent dies or cannot for any reason be found, this will not excuse non-payment by the insured on the date specified. If payment is made by mail or express it must reach the company upon the day on which it is due.

**§ 27. Incontestable clause.** Most life insurance policies have a clause providing that the policy shall be incontestable after two years, or some other stated time. This clause waives all defenses by the company, save that of insurable interest. Since this is a requirement imposed by public policy, it cannot be waived no matter how willing the parties are so to do. Of course, if the policy reserves the right, as it frequently does, to contest for non-payment of premiums, fraud, or suicide, then the company may do so.

**§ 28. What deaths are not covered by the policy: Execution, suicide, death in crime.** Not all deaths are covered by a life insurance policy. It is clearly established that when the insured has been executed as a felon, it is contrary to public policy to allow a recovery. The same principle has been held in a number of jurisdictions to prevail where the insured deliberately committed suicide.

Where the policy is taken out in good faith but the insured later on commits suicide, the courts in general allow a recovery where the policy is payable to some third person as beneficiary. This has been rested upon the ground that the beneficiary has a vested interest, independent of the relation between the insured and the insurance company, and that the beneficiary therefore recovers in his own right and not merely as the representative of the deceased. For converse reasons, the courts have refused a

recovery on the same facts where the policy was made payable to the estate of the deceased. In many policies at the present time there is a clause which provides that there shall be no recovery if the insured shall be executed for a crime or commits suicide. This clause of course settles the matter, and under such circumstances there can be no recovery either by the representative of the deceased or by the beneficiary. Another similar clause is frequently found, which provides that there shall be no recovery where the death took place while the insured was engaged in a violation of the law. Under such circumstances, a recovery was refused where the insured had been justifiably killed in self-defense by a person whom he had attacked.

## CHAPTER XVI.

### TRADE-MARKS.

**§ 1. Definition, origin, and nature.** A trade-mark is a sign, mark, symbol, word or words, or device attached to goods, and adopted by the manufacturer or seller thereof to distinguish his production from other productions of the same article. Its purpose is to indicate, not quality, but the origin and ownership of the article to which it is attached. It may consist of any design, mark, symbol, word or words, or device not previously appropriated by another, and not barred from use as a trade-mark by some rule of law. Trade-marks are of common law origin, and were recognized in a decision as early as 1590, but did not obtain a very firm footing in the law until two centuries later.

**§ 2. How exclusive right to trade-mark is acquired.** The exclusive right to a particular word, device, or sign as a trade-mark, by a manufacturer, merchant, or trader, is acquired by priority of appropriation, or by transfer or succession to one such party from another who has previously acquired it. The claimant of a trade-mark by user must have been the first to use or employ it on goods, manufactured or dealt in by him. A single instance of use, with accompanying circumstances evidencing an intent to continue that use is sufficient to establish the right, and there is no requirement that the use shall continue for any prescribed or definite length of time.

The United States Trade-Mark Act, which will be considered further on in these pages, does not confer on any one the exclusive right to a trade-mark, but merely provides for the registration of a trade-mark by one who has acquired the exclusive right to it; and that such registration shall be prima facie evidence of his right. As a trade-mark has no necessary relation to invention or discovery, as between two rival claimants, it is the party

who first actually uses a mark, and not the one who first thought of it or designed it, who is entitled to protection in its use as a trade-mark; and a mere declaration of intention to use a mark in the future does not create a right to its exclusive use as a trade-mark.

§ 3. **Who may register?** Any owner of a trade-mark who is domiciled within the territory of the United States, or has a manufacturing establishment within the territory of the United States, or resides in or is located in any foreign country which by treaty, convention, or law affords similar privileges to the citizens of the United States, may, subject to the provisions of the act, register his mark in the Patent Office.

§ 4. **The Trade-Mark Act of 1946.** In 1946 a comprehensive revision of the Trade-Mark Acts was enacted. Popularly known as the Lanham Act, it was approved on July 5, 1946, to take effect one year from its enactment. Some of the purposes intended to be accomplished by this new legislation were stated as follows:

1. To put all existing trade-mark statutes in a single piece of legislation.

2. To carry out by Statute our international commitments to the end that American traders in foreign countries may secure the protection of their trade-marks to which they are entitled.

3. To modernize the trade-mark statutes so that they will conform to legitimate, present-day business practice.

4. To remedy construction of the existing act which had in several instances obscured and perverted their original purpose.

5. Generally to simplify trade-mark practice, to secure trade-mark owners in the goodwill which they have built up, and to protect the public from imposition by the use of counterfeit and imitated marks and false trade descriptions.

§ 5. **Registration of trade-marks.** The Lanham Act provides for the registration of trade-marks on two separate and distinct registers which are established in the Patent Office: (1) the Principal Register, of interest especially to those engaged in interstate commerce; and (2) the Supplemental Register, a continuation of the register established by the 1920 act, of interest chiefly to those engaged in foreign commerce.

**§ 6. What marks may be registered?** Section 2 of the Lanham Act (found in U. S. Code, Title 15, § 1052) substantially preserves the rules of the common law as to what marks may or may not constitute valid trade-marks. In other words, it practically limits registration on the Principal Register to marks that would be valid at common law. To give you briefly and completely the rules by which you may determine what may be, and what may not be, registered as a trade-mark, Section 2 is here presented:

"Sec. 2. No trade-mark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it—

(a) Consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt or disrepute.

(b) Consists of or comprises the flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign nation, or any simulation thereof.

(c) Consists of or comprises a name, portrait, or signature identifying a particular living individual except by his written consent, or the name, signature, or portrait of a deceased President of the United States during the life of his widow, if any, except by the written consent of the widow.

(d) Consists of or comprises a mark which so resembles a mark registered in the Patent Office or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when applied to the goods of the applicant, to cause confusion or mistake or to deceive purchasers: *Provided,* That the Commissioner may register as concurrent registrations . . .

(e) Consists of a mark which: (1), when applied to the goods of the applicant is merely descriptive or deceptively misdescriptive of them, or; (2), when applied to the goods of the applicant is primarily geographically descriptive or deceptively misdescriptive of them, except as indications of regional origin may be registrable under section 4 hereof; or (3), is primarily merely a surname.

(f) Except as expressly excluded in paragraphs (a), (b), (c), and (d) of this section, nothing herein shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant's goods in commerce. The Commissioner may accept as *prima facie* evidence that the mark has become distinctive, as applied to the applicant's goods in commerce, proof of substantially exclusive and continuous use thereof as a mark by the applicant in commerce for the five years next preceding the date of the filing of the application for its registration."

**§ 7. What is such near resemblance as is meant by the act?** The words in the following groups have been held to be so nearly similar as to preclude registration of one of them, under the act, where one of the others had been previously registered:

"Oliveine" and "Olivant"; "Optal" and "Optine"; "Liveraid" or "Liverine," and "Liveroid"; "Camille Royal Combination" and "La Camille"; "Old Jay" and "Blue Jay"; "Club Cocktails" and "Chancellor Club"; "Kronpol," "Cronpine" or "Cronpelene" and "Cronpaline."

But the following marks have been held dissimilar for the purpose of registering one after a previous registration of the other: "Sozodont" and "Zodenta"; "Mayfield" and "Mayfair"; "Cuticura" and "Cuticle."

**§ 8. What is descriptive?** It is well established that a mark which is descriptive of the qualities, ingredients, or characteristics of the article to which it is applied cannot constitute a valid trade-mark at common law, and cannot be registered in the Patent Office, for the reason that all persons who are entitled to produce and vend similar articles are entitled to describe them, and to employ any appropriate words for that purpose. A contrary rule would enable one party to appropriate certain descriptive words or phrases, and another party others, until a large part of the English language had been monopolized, and a later entrant into the field might have difficulty in finding words enough left to describe his goods.

Accordingly the following words have been held descriptive in the connection with which they were used: "Air-cell," for a fire-proofing material; "Apple and Honey," for a medicine;

"Best," for flour; "Cantripum," for clothes; "Klean-well," for massage sponges; "Neverstick," for lubricants; "Vogue," for boots and shoes; "Sterling," for ale, on the ground that it denotes genuineness, purity, and superior quality; and "Standard," for machines, whether the machines are, in fact, of superior design or not; in other words, it makes no difference whether the word is correctly descriptive, or falsely descriptive.

But the following words have been held valid trade-marks: "Magnetic Balm" for a medical compound; and "Electro-Silicon" for a polishing compound.

§ 9. **Descriptive symbols.** The following symbols have been held descriptive and incapable of appropriation: The picture of a bag having the open end thereof held closed by a tie, as a mark for bags; and the picture of a corn plaster, as a trade-mark for corn plasters, although not a picture of applicant's particular plaster.

§ 10. **Descriptive by long use.** A mark originally arbitrary may become descriptive by long use and association by the public as for example: "Albany Beef" became descriptive for canned sturgeon; and "New Manny" for harvesting machines.

§ 11. **Word in foreign language.** A name in a well-known foreign language, descriptive of a certain product, cannot be a valid trade-mark on that product in this country, as where it was held that "Matzoon," meaning (in Armenian) fermented milk, is descriptive and cannot be appropriated as a trade-mark, and that the party who introduced the beverages into this country is not entitled to the exclusive use of the name.

§ 12. **Descriptive word on another kind of article.** A descriptive word may be registered as a trade-mark on an article other than that of which it is descriptive, as where "Napthol Methane" was held registrable for carbon black, on the ground that it is well known that such substance does not contain the chemicals indicated by the trade-mark.

§ 13. **New article.** When a new article is produced and is given an arbitrary name by those producing it for the first time, such name, being the only name by which that particular kind of article is known, may thereafter be descriptive. Accordingly the word "Leclanche" was held to have become thus descriptive

of a certain kind of battery, the court saying: "When an article is made that was theretofore unknown, it must be christened with a name by which it can be recognized and dealt in; the name thus given to it becomes public property, and all who deal in the article have the right to designate it by the name by which alone it is recognizable."[2]

§ 14. **Test.** And in general, it may be said that the test is to consider whether the public will on the whole regard the mark as an arbitrary symbol denoting only the origin and ownership of the goods, or as an advertisement of some desirable quality of the goods themselves; it is not whether the words are exhaustively descriptive of the article designated, but whether, in themselves and as they are commonly used by those who understand their meaning, they are reasonably indicative and descriptive of the thing intended.

§ 15. **What marks are geographical?** A geographical name applied in its ordinary signification to merchandise is not a valid trade-mark, as for example, "York," as a trade-mark for stoves and ranges; "Clinton," as a trade-mark for wagons; and "Elgin," for watches, as against manufacturers residing in the locality.

The name of a people has been held to be geographical, as for example, "Grecian," and "French."

But a nickname has been upheld, as for example, "Hoosier," for machinery, and "Yankee," for soap.

§ 16. **Proceedings in Patent Office.** An application for registration of a trade-mark in the Patent Office comprises a formal petition requesting registration, a statement of certain formal matters, a sworn declaration as to facts upon which the right to a registration is based, a drawing of the trade-mark, five specimens[3] of the trade-mark as actually used upon the goods, and a fee of ten dollars. The procedure is governed by the provisions of the statute and by the rules of the patent office.

§ 17. **Term.** Formerly, certificates of registration remained in force for twenty years, but could be renewed from time to

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[2] Leclanche Battery Co. v. Western Elec. Co., 23 Fed. R. 276, 277.

[3] Of facsimiles, when, from the mode of applying or affixing the trade-mark to the goods, specimens cannot be furnished.

time for like periods upon payment of a renewal fee of ten dollars in each case. Now, registration is unlimited.

§ 18. **Cancellation.** Any person deeming himself injured by the registration of a trade-mark in the Patent Office, may, at any time, make application to the Commissioner to cancel such registration. In such case an appropriate proceeding is conducted in the Patent Office to determine priority of adoption of the mark, and, if determined adversely to the registrant, his registration is cancelled.

§ 19. **Assignment of trade-marks.** The Trade-Mark Act provides that a registered trade-mark, or a mark for which application for registration has been made, together with the application for registration of the same, may be assigned in connection with the good will of the business in which the mark is used. Such assignment must be in writing and duly acknowledged according to the laws of the country or state in which the same is executed. Any such assignment is void as against any subsequent purchaser for a valuable consideration, without notice, unless it is recorded in the Patent Office within three months.

It will be noted that the act provides for assignments only in connection with the good will of the business in which the mark is used. This is in accord with the common law rule that trade-marks can be assigned only in such manner, the reason being that a trade-mark is analogous to the good will of a business, and can exist only in connection with the good will, and therefore cannot be separately assigned.

In Bulte v. Iglehart Bros. it was said: "A trade-mark is analogous to the good will of a business. Whoever heard of a good will being sold to one while the original owner continues the business as before; the good will is inseparable from the business itself."

§ 20. **Notice to public.** It is the duty of a registrant to give notice to the public that a trade-mark is registered by marking it with the words "Registered in U. S. Patent Office," or "Reg. U. S. Pat. Off." In any suit for infringement by a party failing so to give notice of registration, no damages can be recovered except on proof that the defendant was duly notified of infringement, and continued the same after such notice.

**§ 21. Registration prima facie evidence of ownership.** The registration of a trade-mark under the provisions of the act is prima facie evidence of ownership.

**§ 22. Infringement.** Any person who, without the consent of the owner, uses a reproduction, counterfeit, copy, or colorable imitation of any registered trade-mark, upon merchandise of substantially the same descriptive properties, and in commerce among the several states, or with a foreign country, or with the Indian tribes, is guilty of infringement of such registered trade-mark, under the act. It should be noted that the act expressly confines cases of infringement to use in the commerce over which Congress has control, as the act purports to be, and is, merely a regulation of such commerce.

**§ 23. Importations.** The act also prohibits the importation into the United States of any article which either copies or simulates the name of any domestic manufacture, or manufacturer or trader; or of any manufacturer or trader located in any foreign country which, by treaty, convention, or law affords similar privileges to citizens of the United States; or which copies or simulates a trade-mark registered in accordance with the provisions of the Act; or which bears a name or mark calculated to induce the public to believe that the article is manufactured in the United States, or that it is manufactured in any foreign country or locality other than the country or locality in which it is in fact manufactured.

In order to aid the officers of the customs in enforcing this prohibition, it is also provided that such manufacturers or traders as are entitled to its protection may register their names and residences, the names of the localities in which their goods are manufactured, and copies of the certificate of registration of their trade-mark, with the Treasury Department, and may also furnish the Department with facsimiles of such names.

## CHAPTER XVII.

## BANKRUPTCY.

**§ 1. Constitutional provision.** The delegates assembled in the Federal constitutional convention in 1787, evidently realizing the intimate connection with and the importance to commerce of a system of bankruptcy laws, inserted in the Constitution a provision giving Congress power, not only over commerce in general between the states, but power to make uniform laws on the subject of bankruptcies throughout the United States.[1] This was the earliest expression on the subject given by the Union.

**§ 2. State versus Federal bankruptcy laws.** The Constitution gave Congress the power to pass bankruptcy laws. Congress has exercised its power at four different times, but long periods of time have elapsed between the repeal of one law and the passage of another. During these periods state bankruptcy laws are operative and in full force. Some states have what may be deemed modern bankruptcy laws while others are only insolvent or poor debtors' acts and stand midway between the common law and a modern system in their operation and effect. When Congress passes an act it operates to suspend all state bankruptcy laws except as to subjects covered by state laws and not covered by the national Act. By suspension is not meant a repeal but merely causing to be dormant, and when the Federal law is repealed such laws spring again into full force. They are effective then, not only to punish acts done after the repeal but even before the repeal, which were not taken advantage of to institute proceedings under the national Act.

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[1] U. S. Const., Art. I, sec. 8, § 4.

§ 3. **Bankruptcy legislation in the United States.** The first Federal bankruptcy act was enacted by Congress in 1800, following closely the bankruptcy law then in force in England. It was repealed four years later.

In 1841, Congress enacted another bankruptcy law. This retained all the essential features of the English law but added to it many new features, making it a modern law for the benefit of debtors as well as creditors. Nevertheless, it was repealed within two years.

Twenty-four years later, in 1867, Congress again tried its hand at bankruptcy legislation; but this new law, after being amended a number of times, was repealed in 1878 without having made any very lasting impression on our legal system.

The first really successful national bankruptcy act was enacted in 1898 and has been in effect ever since. In the intervals between the several national laws here listed, the problems of insolvency and bankruptcy were governed by state insolvency and bankruptcy laws.

The National Bankruptcy Act of 1898 has been amended a number of times, and as a result of conditions growing out of the depression following 1930, a number of provisions providing for the relief of debtors through composition and extension agreements entered into under the supervision and control of the bankruptcy court and for the reorganization of insolvent corporations were added. In 1938 there was a complete revision of the bankruptcy laws, the new law being known as the "Chandler Act." This act retains, almost in its entirety, the Act of 1898, including the numbering of the sections; and, except for a few changes for the sake of clearness, the exact wording of the original act. The debtor relief provisions and the provisions for corporate reorganization were revised to remove the defects disclosed during the years they were in effect, and many improvements in the administration of the law were introduced.

§ 4. **Outline.** The Bankruptcy Act of 1938 includes in one statute several separate and distinct forms of relief. The power of Congress to provide for each of these is found in the clause of the United States Constitution mentioned in § 1. For this reason, it is proper to group them together in one statute and

to discuss them all in this Chapter on Bankruptcy. But for the sake of clearness, they must be considered separately. Ordinary bankruptcy will be considered first. Then will follow corporate reorganizations, arrangements, and wage earners' plans.

§ 5. **Courts of bankruptcy.** All bankruptcy cases must be heard in the Federal courts. State courts do not have jurisdiction. The law provides that "Courts of Bankruptcy shall include the district courts of the United States and of the territories and possessions to which this Act is, or may hereafter be, applicable and the District Court of the United States for the District of Columbia." The judge of the court is assisted in the handling of bankruptcy cases by an officer known as a "referee."

## Section 1. Bankruptcy

§ 6. **Voluntary and involuntary bankrupts.** In the earlier bankruptcy laws, there were no provisions for voluntary bankrupts. The law merely provided that if any person committed certain acts, known as "acts of bankruptcy," his property would be taken away from him at the suit of his creditors and used to pay his debts. There was no discharge. In later laws, provisions for discharging the bankrupt from all his provable debts were introduced, and these have been a feature of every bankruptcy law enacted by the United States Congress.

Under the present laws, two methods of becoming a bankrupt are provided for: voluntary and involuntary. A voluntary bankrupt is one who files a petition in a bankruptcy court asking to be adjudged a voluntary bankrupt and to be given the benefits of the Act. An involuntary bankrupt is one against whom an involuntary petition has been filed by his creditors.

§ 7. **Who may become bankrupts?** Any person, except a municipal, railroad, insurance, or banking corporation or a building and loan association, may be a voluntary bankrupt, whether he is insolvent or not, or whether he has committed any act of bankruptcy or not.

Any natural person, except a wage earner or farmer, and any moneyed, business, or commercial corporation, except a

building and loan association, a municipal, railroad, insurance, or banking corporation, owing debts to the amount of $1,000 or over may be adjudged an involuntary bankrupt.

It should be noted that a wage earner or farmer may become a voluntary bankrupt, but he cannot be forced into bankruptcy. A wage earner is defined to be an individual who works for wages, salary, or hire at a rate of compensation not exceeding $1,500 a year. A farmer is one who is engaged in farming or tillage of the soil, including those in dairy farming, production of poultry, livestock, or poultry or livestock products in their manufactured state, if his income is derived principally from one or more of such operations.

Under Section 5a, a partnership may be adjudged a bankrupt either separately or jointly with one or more general partners.

§ 8. **Duties of bankrupts.** It is the duty of the bankrupt to attend the first meeting of his creditors and the hearing upon his application for a discharge where directed to do so by the court; to comply with all lawful orders of the court; to examine the correctness of all proofs of claim filed against him; to execute to the trustee in bankruptcy transfers of all property in foreign countries; to immediately inform his trustee of any attempt by his creditors or other persons to evade the provisions of the bankruptcy act; to inform the trustee of any false claims which may have been proved against his estate; to prepare, make oath to, and file in court a schedule of his property and a list of his creditors; to file a statement of his affairs at least five days before the first meeting of his creditors; to submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, and all other matters which may affect the administration and settlement of his estate.

§ 9. **Acts of bankruptcy.** Before any person can be forced into bankruptcy as an involuntary bankrupt, he must have committed one or more of the acts of bankruptcy enumerated in Section 3a of the law, which is as follows:

"Section 3a—Acts of bankruptcy by a person shall consist of his having

"(1) Conveyed, transferred, concealed, removed, or permitted to be concealed or removed any part of his property, with intent to hinder, delay, or defraud his creditors or any of them; or

"(2) Transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or

"(3) Suffered or permitted, while insolvent, any creditors to obtain a lien upon any of his property through legal proceedings and not having vacated or discharged such lien within thirty days from the date thereof or at least five days before the date set for any sale or other disposition of such property; or

"(4) Made a general assignment for the benefit of his creditors; or

"(5) While insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property; or

"(6) Admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt."

The commission of an act of bankruptcy is not necessary where the debtor files the petition himself, asking to be declared a voluntary bankrupt.

In order to take advantage of an act of bankruptcy, the creditor must file his petition against the debtor committing it within four months. It will be noted that in order to commit the second, third, or fifth acts of bankruptcy, the debtor must have been insolvent. The law provides that it shall be a complete defense to any proceeding under the first act of bankruptcy for the debtor to allege and prove that he was not insolvent at the time the petition was filed against him. Insolvency, in this connection, means owning insufficient property to pay debts.

§ 10. **Fraudulent conveyances: Statute of Elizabeth.** The foundation of the first act of bankruptcy, that of conveying property with intent to hinder, delay, and defraud creditors—more commonly styled making a fraudulent conveyance—is historically traceable to a period of time antedating the earliest English bankruptcy legislation. Creditors had certain recognized rights in fraudulent conveyances at common law. But in the year 1570 the English Parliament passed an act with reference to such conveyances. It is always referred to in bankruptcy and insolvency matters as the "Statute of Elizabeth." It made it a criminal offense knowingly to participate in a conveyance made by a debtor with an intent to defraud his creditors, and declared that such conveyances should be void as to them, but protected purchasers of the property in any rights they acquired without knowledge of the fraud. This statute was largely declaratory of the common law. Since its passage it is generally looked upon as the source of the rights of creditors to defeat fraudulent conveyances. The creditor's remedy at common law and under this statute is simple. He realizes his claim out of his debtor's property by proceeding against it by attachment or execution, as if the title or possession or both were still in the debtor. He seizes and sells it as if it were still the debtor's property. If it cannot be sold advantageously by reason of a cloud on the title created by the deed of conveyance, as often happens in the case of land, he may proceed in equity to remove the cloud.

§ 11. **Same: In bankruptcy act.** As this statute existed before the settlement of the Colonies, it is deemed a part of the common law of the states and regulates the rights of creditors in fraudulent conveyances even today, subject to certain modifications and developments. It was this historical, part common law and part statutory, conception of a fraudulent conveyance as developed in the various states that Congress intended to be applied in determining when a debtor has violated this section of the bankruptcy law. As there are numerous conveyances which the common law pronounces fraudulent toward creditors—the machinations of debtors to cheat their creditors having assumed as many forms as human ingenuity could in-

vent—and which are, therefore, considered acts of bankruptcy, an examination of some of them to ascertain their peculiar characteristics and also the underlying principles of the common law and Statute of Elizabeth is essential to a correct understanding of what constitutes a violation of the section of the statute prohibiting such conveyances.

**§ 12. Retention of possession by seller.** It is a rule under the common law and Statute of Elizabeth that, if a debtor makes a transfer of chattels by bill of sale and remains in possession of them, with no circumstances tending to explain his retention of possession, the transfer is a fraudulent conveyance.

**§ 13. Conveyances in consideration of support of grantor.** Another form of conveyance which the courts have held fraudulent is that of debtor's transferring his property to another for the latter's promise to support him during the remainder of his life. This is the rule even where the debtor has no actual intent to hinder his creditors. Thus, in one case, a debtor who was seventy-two years old conveyed his house and lot to another for the latter's agreement to support him the rest of his life. At the time of the conveyance the debtor supposed he had paid all his debts, but it transpired later that he had certain creditors. The court held the conveyance was void as to those creditors. And this seems to be the rule even though there is every possibility of the debtor's living sufficiently long to make the property transferred in the conveyance only reasonably adequate compensation for the support promised. The underlying objection is the transformation of the property into a form upon which creditors cannot realize, although the promise to support received in return was adequate value for the property conveyed away. The rule in the various states is almost uniformly in accord with that illustrated by the instance given.

**§ 14. Inadequacy of price.** In the preceding subsection the debtor received what ordinarily would be deemed full compensation for the transfer, yet creditors may attack such a conveyance owing to the fact that the compensation was inadequate in that it was unavailable to them. Some courts have held that a sale by a debtor of property for which he received an inadequate price is fraudulent and may be avoided. Thus, it was held that

the conveyance of land worth $2,000 for the consideration of $100 was fraudulent.

**§ 15. Conveyance upon secret trust.** A conveyance of property by a debtor to another, with a secret understanding between them that the latter is merely to hold it in trust for him for a time until financial troubles shall have passed, is void, and may be attacked by creditors who are prejudiced by it. The rule is the same where the conveyance is made to secure advances, but the deed of conveyance, which far exceeds in value the amount of the loan, is made absolute, with the secret understanding that it is to operate as a mortgage instead of making the deed in form a mortgage. Thus, a debtor conveyed land exceeding in value the sum of two thousand dollars advanced to him as a loan. The deed purported to convey a title absolute. The intention of the parties was, in fact, that the title should be held merely as a security for the loan, and, when that was repaid, it should be reconveyed. It was held that the deed was void. In such a case, where there is no actual intent to defraud, but merely circumstances from which courts presume such an intent, the transferee may attach a lien to the land for the loan he made in good faith.

**§ 16. Conveyances both to pay past debt and to defraud creditors.** The law discourages a conveyance of property, part of which is to be applied in payment of an honest debt and the balance to be held by the transferee in trust to prevent creditors from getting it. If the transferee knows and participates in the debtor's intent to defraud his creditors, the conveyance cannot stand to any amount against the creditors. They may set it aside without permitting the transferee to retain a lien on the property for the amount of his honest claim. A grantor of land was indebted to another in the sum of $8,000. To pay the latter he deeded him land which was worth much more than the amount of his claim. In order to make the transaction appear fair, the debtor and creditor jointly fabricated a fictitious debt for board and washing. The court held the conveyance was fraudulent as to creditors, and refused to permit a lien to be attached for the honest debt of $8,000, saying: "The contention that the conveyance may be sustained to the extent of the adequate and honest part of the consideration is fully answered by the authorities, which hold that when the deed is fraudulent against creditors

it is wholly void and cannot stand to any extent as security or indemnity."

§ 17. **Preferment of creditors.** At common law debtors were permitted to prefer creditors if they desired. By giving a preference is meant the payment to one creditor of an honest debt without paying a like proportion to others. And a debtor could do this, if he did it with the actual intention of making payment merely, even though he intended not to pay others and even though the creditor paid knew this fact. In a certain case a husband had land, for which he had made payment, conveyed to his wife in satisfaction of a debt he owed her for money she had loaned him after their marriage. The court held the conveyance could not be attacked by creditors. It arrived at this conclusion although the debt to the wife was barred by the statute of limitations. From this case may be deduced the principle that at common law and under the Statute of Elizabeth it was not a fraud upon creditors for a debtor to pay one of his creditors in full to the exclusion of others.

§ 18. **Exchanging non-exempt for exempt property.** The universal rule in the various states allows a debtor who owns non-exempt property to exchange it for or invest it in exempt property, which creditors cannot take from him to satisfy their claims, without permitting the unpaid creditors to take any advantage of his action. A Nebraska farmer owned a farm worth $6,100, of which $2,000 were exempt from creditors and $4,100 not exempt. He sold this farm and invested all the money in a Kansas farm, all of which was exempt by the law of the latter state. A party who was a creditor while he owned the Nebraska farm sought to collect his claim out of the Kansas land. The court held he could not do this, as the debtor had a right to transform his property from non-exempt to exempt property without giving the unpaid creditors any basis of complaint.

§ 19. **Voluntary conveyances.** A very common form of conveyance by debtors, which is attacked by creditors, is the so-called "voluntary conveyance." By this is understood a transfer of valuable property without receiving compensation therefor, or, in short, as a gift. Conveyances by husband to wife or parent to child, as a gift, with no intention or thought of hindering

creditors are common, and whether or not such a conveyance can be successfully attacked by creditors depends upon the circumstances of the case and the jurisdiction where it is made. There is a well-known principle of the law of fraudulent conveyances embodied in the language that "A man should be just before he is generous." It has particular application to cases of voluntary conveyances made by debtors. A debtor may make a voluntary conveyance, and as a result leave himself with insufficient property in his possession to meet his honest debts. Such a conveyance as a gift is void and may be successfully set aside.

§ 20. **General assignments for benefit of creditors.** A common device resorted to by a debtor in stringent circumstances is to make a transfer of all his property to another as trustee, in trust to distribute it or its proceeds among all of the creditors. In the absence of statutory prohibition, there is no objection to such an assignment. However, such an assignment cannot contain provisions that tend to delay the creditors. Thus, in a case where the deed of assignment provided that the assignee should in his discretion carry on the business for such time as he should think it for the best interests of the creditors and necessary for the purpose of preventing shrinkage or loss, the court held the conveyance was fraudulent, as the deed attempted to leave the question whether the debtor should have further indulgence with him instead of with the creditors, where it belonged. Making such a conveyance is an act of bankruptcy under that portion of the Act which prohibits fraudulent conveyances. A general assignment which has no features that are objectionable under the common law is prohibited by another portion of the statute, and the act of making such a conveyance subjects the grantor to a bankruptcy proceeding in the Federal courts. This proceeding is not based on the ground that the debtor made a fraudulent conveyance, but on the ground that he made a conveyance prohibited by the Act.

§ 21. **Assignments with preferences.** At common law an assignment wherein a debtor made provisions for paying some creditors a greater proportion of their claims than others was allowable. Preferences are entirely unobjectionable at common law. Such assignments are, however, in most states prohibited by statute and are, as will be seen below, prohibited under the

national bankruptcy law by making a preference an act of bankruptcy. By the law of some states, if a deed of assignment contains a clause providing for a preference to some creditor or creditors, the entire deed is void and of no effect and is treated as a fraudulent conveyance. Other states merely invalidate the clause giving the preference, and permit the creditor whom the debtor sought to prefer to receive only his pro rata portion the same as other general creditors.

§ 22. **Preferences.** It has been stated above (§ 17) that a preference is the payment by a debtor of an honest debt, or a portion thereof, to one or more of his creditors without paying a like proportion to other creditors. It was also stated that this may be done at common law. This is not true under the Act. Either voluntarily giving, or involuntarily and unavoidably suffering and permitting a preference to be acquired, constitutes an offense under the statute upon which a petition in bankruptcy can be based.

§ 23. **How creditors may force debtor to commit an act of bankruptcy.** It is in connection with the law of preferences that creditors are given a means under the statute of forcing an insolvent debtor who makes no move otherwise prohibited by the law upon which proceedings against him may be based, to commit an act of bankruptcy. This they accomplish by procuring a judgment against him, levying upon his property, and fixing a day for its sale. If he fails to vacate the levy within five days of the day set for the sale, he will have committed an act of bankruptcy. If, on the other hand, he pays the judgment and thus vacates it, being insolvent, he will have paid the judgment creditor in full, whereas no payment has been made to other creditors, and will have violated another part of the law. If he does not vacate the lien he will be guilty of an act of bankruptcy, and he will not escape it if he does. Under such circumstances he can only avoid the preferential sections of the law by having a friend advance the money and release the claim for him without diminishing his assets.

§ 24. **Who may file the petition?** Any person who wishes to be adjudged a voluntary bankrupt may file a petition. But when the purpose is to force a person who has committed an act

of bankruptcy into bankruptcy, it is necessary that three or more creditors who have provable claims, fixed as to liability and amount against him amounting in the aggregate to more than $500, join in the petition. However, it is provided that if the person has less than twelve creditors, any one of them whose claim amounts to $500 or more may file this petition. For this purpose in determining the number of creditors, certain persons cannot be counted. Among these are employees, relatives, stockholders and officers if the bankrupt is a corporation; those who took part in the act of bankruptcy; and those who are fully secured.

**§ 25. Defenses against involuntary bankruptcy.** There are many possible defenses which may be set up against involuntary bankruptcy. The debtor may claim that he is not engaged in a business or occupation of such a character as to make him amenable to the Bankruptcy Act, or that he does not have sufficient debts to entitle the petitioners to proceed against him. He may deny that he committed the act of bankruptcy set forth in the petition. He may assert that the petitioning creditors or some of them have no claims against him, or that the amount of their claims is insufficient to sustain their action. He may show that he did not have his domicile, residence, or principal place of business in the territorial jurisdiction of the court for six months, or the greater part, thereof, immediately preceding the filing of the petition. He may show that the act of bankruptcy was not committed within four months of the filing of the petition. He may allege and prove that he was not insolvent at the time of the filing of the petition, which would be a complete defense in the case of most of the acts of bankruptcy.

If, in any case, the issues are decided in favor of the petitioner, the court enters a decree of adjudication and, thereafter, the bankrupt and his property are governed by the provisions of the statute.

**§ 26. Meetings of creditors, trustees.** Not less than ten nor more than thirty days after adjudication of bankruptcy, a creditors' meeting is held at the county seat of the county "in which the bankrupt has had his principal place of business,

resided, or had his domicile''; or, if that is inconvenient, at some other convenient place fixed by the court.

The meeting is presided over by the judge or by a referee in bankruptcy. In order to be able to vote, a creditor's claims must have been allowed. It is important, therefore, that creditors file their claims promptly. Claims may be filed in the bankruptcy court, or with the referee if the case is in the hands of a referee.

Proof of claim consists of a statement under oath, in writing, signed by the creditor, and setting forth the claim; the consideration therefor; whether it is secured, and how; what payments have been made, if any; and that the claim is justly owing from the bankrupt to the creditor.

At the first creditors' meeting, as at all others, the creditors may take such steps as may be pertinent or necessary for the promotion of the best interests of the estate. It is at this meeting that the trustee is appointed. The title to all the bankrupt's property, except such as is exempt, vests in the trustee as soon as he is appointed, and it becomes his duty, under the supervision of the court, to collect and reduce to money all the property of the estate and close up the estate as promptly as possible.

All moneys must be deposited in designated depositories, and disbursements must be made only by check or draft on these depositories. He must keep records and accounts showing all amounts and items of property received and from what source; also, all amounts expended and for what purposes. He sets apart exemptions, passes upon proofs of claims, objects to those that may be improper, and pays dividends after they have been declared by the referee. He must make final reports and file final accounts with the court fifteen days before the date fixed for the final meeting of creditors, and he must furnish detailed statements of the administration of the estate to the creditors' meetings.

In view of the importance of the office, great care should be exercised in the selection of the trustee. The law requires that his appointment be approved by the court and that he give bond for the faithful performance of his duties.

§ 27. **Preferences and fraudulent conveyances.** The trustee,

in collecting the assets of the bankrupt, has the right to recover preferences given by the bankrupt, if the creditor receiving the benefit had reasonable cause at the time the transfer was made to believe that the debtor was insolvent. A preference is defined as a transfer of any of the property of a debtor to or for the benefit of a creditor, or on account of an antecedent debt made or suffered by the debtor while insolvent and within four months before the filing by or against him of the petition in bankruptcy.

The trustee may also have set aside fraudulent conveyances made by a bankrupt. In fact, under subdivision (e) of Section 40 of the Act, he is vested with title to property transferred in fraud of creditors. Observe that there is no four-month limit applying to fraudulent conveyances as there is to preferences.

What transfers are fraudulent has been sufficiently considered in §§ 10 to 19 above. Certain specific transfers made and obligations incurred by a debtor within one year of the filing of a petition against him in bankruptcy are declared fraudulent in Section 67d of the Act.

**§ 28. Provable claims.** The debts which may be proved and allowed against a bankrupt estate, and upon which dividends may be paid if there are sufficient assets, are thus classified in Section 63 of the Act:

1. Those founded on a fixed liability, as by a judgment or instrument in writing, absolutely owing when the petition is filed, whether then payable or not.
2. Costs taxable against the bankrupt in a cause of action which would pass to the trustee and which the trustee declines to prosecute.
3. A claim for taxable costs incurred by a creditor before the petition was filed in an action to recover a provable debt.
4. Open accounts or contracts, express or implied.
5. Provable debts reduced to judgment after the petition, but before application for discharge.
6. Awards of an industrial accident commission or officer under State Workmen's Compensation

laws in case of injury or death occurring prior to adjudication.

7. The right to recover damages in any action for negligence, instituted prior to and pending at the time of filing the petition.
8. Contingent debts and contractual liabilities.
9. Claims for anticipatory breach of contracts, including unexpired leases of real or personal property; but damages for rejection of an unexpired lease, or indemnity under a covenant in a lease, shall not be allowed in an amount exceeding the rent reserved by the lease for the next year after surrender of the premises to the landlord or his reentry plus an amount equal to the unpaid rent accrued, without acceleration up to such date.

The mere fact that a claim is provable and is filed is no reason for its being allowed. The trustee may set up any defenses against a claim that the bankrupt himself might have set up if there had been no bankruptcy. For example, the trustee may set up the defense that the claim is barred by the Statute of Limitations; or that it is not enforcible because not in writing, if required to be so by the Statute of Frauds; or that the claimant is himself guilty of a breach of the contract upon which the claim is based. Creditors also may object to the allowance of claims where defenses exist, in order to protect their own rights. These objections are heard and determined by the court, and the claims may be either allowed or rejected. A very important point to remember is that claims which are not filed within six months after the first date set for the first meeting of creditors will not be allowed. The law, however, gives the court power to grant a reasonable extension of time for filing claims for good cause shown.

§ 29. **Priorities of claims.** In the distribution of the estate, certain claims are by law given priority; that is, they are to be paid in full before dividends are to be paid to general creditors. The necessary expenses of the bankruptcy proceedings naturally come first. Then follow in order:

1. Wages, not to exceed $600 to each claimant, earned within three months before commencement of the proceedings.
2. Costs and expenses of creditors in opposing wage earners' plans where successful.
3. Taxes due to the United States or any state or subdivision thereof.
4. Debts entitled to priority by the laws of the United States and rent owing to a landlord who is entitled to priority under state laws, limited, however, to rent for actual use of premises and which accrued within three months before bankruptcy.
5. Debts contracted while a discharge is in force, if the discharge is revoked.

It should be remembered that claims of secured creditors (claims secured by mortgages, liens, and other forms of security) are not to be confused with the claims of general creditors. The secured creditor may waive his security and file his claim as unsecured and share with general creditors. But if he enforces his liens, and not enough is realized to satisfy his claim in full, he may share with the other creditors in the dividends on the unsatisfied part.

**§ 30. The discharge in bankruptcy.** A discharge in bankruptcy releases the bankrupt from all his provable debts, with certain exceptions mentioned in the Act. The adjudication that any person, except a corporation, is a bankrupt automatically operates as an application for a discharge. A corporation may make application within six months. But a discharge is not granted as a matter of course. The court fixes a time for the filing of objections. Notice is given to creditors, to the trustee and his attorney, and to the United States attorney for the judicial district, and any or all of these may file objections to the discharge. The grounds upon which discharge may be opposed are substantially as follows:

That the bankrupt has

1. Committed an offense punishable by imprisonment under the Act.

2. Destroyed, falsified, concealed, or failed to keep books of account or records from which his financial condition and business transactions might be ascertained.
3. Obtained money or property or credit or an extension of credit by making or publishing a materially false statement in writing respecting his financial condition.
4. Within twelve months prior to bankruptcy transferred, removed, destroyed, or concealed any of his property with intent to hinder or defraud his creditors.
5. Within six years prior to bankruptcy, been granted a discharge in bankruptcy or had a composition or arrangement by way of composition under the Act.
6. Refused to obey any lawful order of, or to answer any material question approved by, the court in the course of the proceedings.
7. Failed to explain satisfactorily any losses or deficiency of assets to meet his liabilities.

A discharge may be revoked upon application at any time within one year if shown to have been obtained by fraud of the bankrupt and that the actual facts did not warrant the discharge.

Discharge, as stated above, has the effect of releasing the bankrupt from all his provable debts except:

1. Taxes.
2. Liabilities for money or property obtained by false pretenses or representations; or for willful and malicious injuries to the person or property of another; or for alimony; or for maintenance or support of wife or child; or for seduction of an unmarried female; or for breach of promise of marriage accompanied by seduction; or for criminal conversation.
3. Debts which have not been scheduled in time for proof and allowance, with the name of the

creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy.

4. Debts created by fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in a fiduciary capacity.
5. Wages earned within three months before commencement of the proceedings due to workmen, servants, clerks, or traveling or city salesmen, on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt.
6. Debts due for moneys of an employee received or retained by the employer to secure the faithful performance by such employee of the terms of a contract of employment.

### Section 2. Corporate Reorganizations

**§ 31. Subdivisions of the law.** The first seven chapters of the Federal Bankruptcy Act deal with the subject of bankruptcy in the ordinary sense. These chapters include all of the original bankruptcy act of 1898 except a few sections relating to compositions which have been incorporated in some of the later chapters. Chapter 8 deals with agricultural compositions and extensions, which are declared to be temporary or emergency measures and hence are not considered here. It also deals with reorganization of railroads engaged in interstate commerce, a subject which is beyond the scope of this work. Chapter 9 provides a means for readjusting the debts of taxing districts. This is temporary legislation and beyond the scope of this work.

Chapter 10 provides for corporate reorganizations and is a reenactment of Section 77B of the prior law with many additions and improvements. Under it, any corporation which could be adjudged a bankrupt (see § 7 above) and any railroad corporation which could not file a petition for reorganization under Chapter 8 referred to above may be reorganized if it is insolvent or unable to pay its debts as they mature.

§ 32. **Who may petition?** The petition for reorganization may be filed by the corporation itself, or by three or more creditors who have claims against the corporation or its property amounting to $5,000 or more, or by an indenture trustee where securities have been issued under an indenture appointing a trustee. If a regular bankruptcy proceeding has been started, the petition for reorganization may be filed in that proceeding.

§ 33. **The petition.** After stating that the corporation is insolvent or unable to pay its debts, the petition must show the nature of the corporation's business; its financial condition; steps that have already been taken toward reorganization or readjustment; the necessity for relief under Chapter 10; and why the relief afforded under Chapter 11, which provides a means of perfecting and putting into effect plans for the settlement, satisfaction, or extension of time of payment of the debts of ordinary debtors, would not be adequate. It closes with a request that a plan of reorganization be effected. If the petition is filed by a creditor or indenture trustee, additional facts must be shown, as that the corporation has been adjudged a bankrupt, or has committed an act of bankruptcy, or that a mortgage foreclosure suit is pending against the greater portion of its property. The fee for filing the petition is $100; but if a bankruptcy proceeding is already pending, only $70.

If the court is satisfied that the petition complies with the requirements of the law and is filed in good faith, an order approving it is entered; but if not so satisfied, the petition is dismissed.

Upon the approval of the petition, steps must be taken to prepare a plan of reorganization. The first important step is the appointment of trustees. If the debts of the corporation amount to $250,000 or more, the judge must appoint one or more disinterested trustees. If the debts are less than $250,000, the judge may allow the debtor corporation to continue in possession or appoint trustees as above; but if trustees are appointed, he may appoint an additional trustee who is an officer, director, or employee of the debtor.

§ 34. **Preparation of the plan.** The burden of preparing the plan of reorganization is upon the trustee. For this purpose

he is given power to investigate, to examine witnesses, and to employ assistants. If the debtor is continued in possession, the judge may appoint a disinterested person as examiner to prepare a plan; or the debtor, or any creditor or indenture trustee, may file a plan. After the plan is filed, hearings are held for the consideration of objections, amendments, or new plans. Before final approval, the plan may be—and if more than $3,000,000 of indebtedness has been scheduled, must be—submitted to the Securities and Exchange Commission for examination. After the plan has been approved, full information regarding its contents is sent to all creditors and stockholders.

§ 35. **Provisions of the plan.** The law sets forth in detail what shall be included in a plan of reorganization. There are practically no limits on the changes that may be made in the financial structure of the corporation. All or any part of its property may be dealt with; executory contracts may be rejected or retained; provisions may be made for a sinking fund for the retirement of long-term indebtedness.

The plan must specify what claims, if any, are to be paid in full, and what creditors or stockholders are not to be affected. It must provide for classes of creditors affected by the plan which do not accept it by two-thirds majority in amount, so that they will realize the value of their claims. It must make provisions for any class of stockholders affected by the plan which does not accept it by a majority of the stock, so that they will realize the value of their equity, if any, in the property of the corporation. It must include equitable provisions for the selection of directors, officers, or trustees; and it must provide for inclusion in the charter of the corporation certain safeguards, such as that it shall not issue non-voting stock; that there shall be a fair and equitable distribution of voting power among the several classes of stock issued; and provisions which are fair and equitable and in accord with sound business and accounting practices, with respect to the terms, rights, and privileges of the several classes of securities of the corporation.

§ 36. **Confirmation of the plan.** After the plan has been accepted by creditors holding two-thirds in amount of the claims filed and allowed in each class and—if the corporation being

reorganized has not been found to be insolvent—by stockholders holding a majority of each class of stock, the judge fixes a time for a hearing for the consideration of the confirmation of the plan and any objections that may be made. Notice is given to the debtor, creditors, stockholders, indenture trustees, the Secretary of the Treasury, the Securities and Exchange Commission, and such other persons as the judge may designate.

After the hearing, the judge will confirm the plan if satisfied that—

1. All claims due the United States are properly provided for, and that the plan adopted complies with the requirements of the Act.
2. The plan is fair, equitable, and feasible.
3. The plan has been proposed and accepted in good faith and has not been made or procured by means or promises forbidden by the Act.
4. All payments made or promised for services, costs, and expenses have been fully disclosed to the judge and are reasonable.
5. The identity, qualifications, and affiliations of the persons who are to be directors or officers or voting trustees upon consummation have been fully disclosed, and that their appointment is equitable, compatible with the interest of the creditors and stockholders, and consistent with public policy.

Upon confirmation of the plan, it becomes binding upon all parties affected, including the debtor corporation and all creditors and stockholders, whether they have accepted it or filed proofs of their claims or not. Upon its consummation, the judge enters a final decree discharging the debtor from all its debts and liabilities and terminating all rights and interests of stockholders of the debtor, except as provided in the plan or in the order confirming it or in the order directing or authorizing the transfer or retention of property. The decree also discharges the trustee, makes provisions for any injunctions that may be equitable, and closes the estate.

## Section 3. Arrangements

**§ 37. Types of arrangements.** Under this head, at least three kinds of arrangements are grouped. Chapter 11 of the Bankruptcy Act makes provision for "Arrangements" by debtors generally "for the settlement, satisfaction, or extension of time of payment of their unsecured debts upon any terms." Chapter 12 makes provision for arrangements or plans, the primary purpose of which is the alteration or modification of the rights of creditors or any class of them, holding debts secured by real property or a chattel real of which the debtor is the legal or equitable owner. Chapter 13 provides for plans for composition or extension for the payment of the debts of wage earners, a wage earner being defined as one who works for wages, salary, or hire at a rate of compensation which, when added to all his other income, does not exceed $3,600 a year.

**§ 38. Arrangements under Chapter 11.** It will be noted that under Chapters 11, 12, and 13 the persons for whom arrangements are to be made are referred to as "debtors" and not as "bankrupts." Under Chapter 11, "debtor" means any person who could become a bankrupt under Section 4 of the Act (see § 7) and who files a petition under the chapter. It will be observed that the term includes corporations as well as natural persons.

The petition for relief under this chapter must be filed by the debtor himself. If a regular bankruptcy proceeding is pending, he may file his petition in connection with that. If no bankruptcy proceeding is pending, he may file an original petition proposing an arrangement. The petition in any case must state that the debtor is insolvent or unable to pay his debts as they mature, and it must set forth the provisions of the arrangement which he proposes. With the petition must be filed a statement of the debtor's executory contracts, schedules, and a statement of his affairs if he has not previously filed them; and, if he has not already paid them, the fees required by the Act. After the filing of the petition, the court may, on notice and a hearing, make such provision as may be proper for the protection of the estate until the entry of an order of adjudica-

tion. This may include the filing of a bond with sureties approved by the court.

After the filing of the petition, the case may be referred to a referee, a receiver may be appointed upon the application of any party in interest, appraisers may be appointed, and a meeting of creditors will be called. The notice to creditors must be accompanied by a copy of the proposed arrangement, a summary of the debtor's liabilities, and a summary of the appraisal of his property, if one has been made; otherwise, a summary of his assets.

At the meeting of creditors, proofs of claims may be received and allowed or disallowed, the debtor may be examined, acceptances of the proposed arrangement by the creditors may be received, and the judge may fix a time for the filing of the application to confirm the arrangement and for a hearing on it.

**§ 39. Provisions of arrangement.** The arrangement must include provisions modifying or altering the rights of unsecured creditors generally, or some class of them, and these may be upon any terms or for any consideration. The unsecured debts may be treated as on a parity one with the other, or they may be divided into classes, and the classes may be treated in different ways or upon different terms. Executory contracts (contracts not yet performed) may be rejected; provisions may be included for specific undertakings by the debtor during periods of extension, as, for instance, to make payments on account or for the termination of an extension period under specified conditions. The debtor may be allowed to continue his business, with or without supervision by a receiver or committee of creditors, and the court may retain jurisdiction over the case until the provisions of the arrangement have been performed.

An arrangement accepted in writing at the creditors' meeting by all the creditors will be confirmed by the court as soon as the debtor has made the deposits required by the law and the arrangement, if the court is satisfied that it was proposed and accepted in good faith and no prohibited means have been used. If it is not so accepted, application for confirmation must be made within the time fixed by the court, but not before the arrangement has been accepted by a majority in number of all

creditors; or, if they have been divided into classes, by a majority of the creditors in each class affected by the arrangement, and whose claims have been proved and allowed; this number must also represent the majority in amount of such claims. The court will confirm the arrangement if satisfied that the provisions of the chapter have been complied with; that the plan is for the best interest of the creditors; that it is fair, equitable, and feasible; that the debtor has not been guilty of anything which would be a bar to a discharge in bankruptcy; and that the proposal and its acceptance have not been made or procured by any forbidden means.

**§ 40. Effect of confirmation.** The confirmation of an arrangement has the effect of discharging a debtor from all his unsecured debts and liabilities provided for by the arrangement, except as provided in the arrangement and the order confirming it, excluding such debts as under Section 17 (see § 30) are non-dischargeable.

After confirmation and consummation of the proceeding, the court will enter a final decree discharging the receiver or trustee and closing the estate.

**§ 41. Real property arrangements.** Chapter 12 applies to any person other than a corporation who could become a bankrupt under Section 4 (see § 7), provided he is the legal or equitable owner of real property or a chattel real which is security for a debt. But a mere right to redeem from a prior sale is not a sufficient interest. Note that a corporation cannot file a petition under this chapter.

The primary purpose of the arrangement provided for here must be the alteration of the rights of creditors who hold debts secured by real property; but the plan, when perfected, must provide for the rights of all classes of creditors affected by the arrangement, whether secured or unsecured.

The procedure to be followed under Chapter 12 is in general the same as that outlined in Chapter 11. As in Chapter 11, the debtor must be insolvent or unable to pay his debts as they mature. The same schedules and statements of affairs must be filed. Creditors' meetings must be held, claims must be presented and allowed or rejected, and, in proper cases, a trustee may be

appointed. When appointed, the trustee has not only the powers of an ordinary trustee in bankruptcy, but, in addition, the powers of a receiver in equity, including the power, under the control of the court, to operate the business and manage the property of the debtor; and, with the permission of the court, to issue certificates of indebtedness for cash or other consideration approved by the court.

The plan may make any modifications in the rights of creditors, secured or unsecured; may divide creditors into classes and provide for different treatment for one class from that provided for another; may deal with any part of the debtor's property or with all of it; and must provide, for any class of creditors affected by it which does not accept it by two-thirds majority in amount, adequate protection for the realization by them of the value of their debts against the property dealt with, by one of the methods described in the chapter. These include:

1. Transfer of the property or sale of it subject to the debts;
2. Retention of the property by the debtor subject to the debts;
3. Sale free of the debts at not less than a fair upset price and use of the proceeds to satisfy the debts;
4. Appraisal of the debts and payment in cash.

When a debtor files a petition under Chapter 12, he must set forth the terms of the arrangement which he proposes, and there is no requirement that it be first approved by creditors affected. But before a creditor can propose a plan, it must have been accepted by creditors holding debts amounting to 25 per cent or more of the debts of some class of creditors, and 10 per cent or more of the debts of all creditors affected. If it has been accepted by all creditors affected, it will be confirmed by the court as soon as the necessary deposits are made and the court is satisfied that the arrangement and its acceptance are made in good faith and have not been obtained by forbidden means. If not so accepted, the arrangement will not be confirmed until it is accepted in writing by creditors of each class of creditors affected holding two-thirds in amount of the debts of such class which

have been approved and allowed. In addition, required deposits must be made and the court must be satisfied that the plan is for the best interests of creditors; that it is fair, equitable, and feasible; that the debtor has not been guilty of any act which would bar a discharge of a bankrupt; and that the plan has been proposed and accepted in good faith and was not obtained by forbidden means. All payments for services, costs, or expenses made or promised in connection with the proceeding must be disclosed to the court and must be reasonable.

Confirmation of an arrangement binds the debtor, his creditors, and all those who issued securities or acquired property under it. It also operates as a discharge of the debtor from the debts and liabilities covered by it, except as provided in the arrangement itself.

**§ 42. Wage earner plans.** These are provided for by Chapter 13. "Wage earner," as previously stated, means an individual who works for wages, salary, or hire at a rate of compensation which, when added to all his other income, does not exceed $3,600 a year. Such a person, if insolvent or unable to pay his debts as they mature, may file a petition, either in a pending bankruptcy proceeding or in an original proceeding, asking for a composition or an extension or both, out of his future earnings or wages.

After the petition is filed, accompanied by lists of executory contracts, schedules, and statement of affairs, a meeting of creditors is promptly called, at which claims of creditors may be proved and allowed. The debtor submits his plan at this meeting, and there are no limitations upon the terms which he may propose with respect to his debts, whether secured or unsecured. The plan must provide for the submission of the debtor's future earnings to the control of the court for the purpose of enforcing the plan, and for power on the part of the court to increase or decrease the amount of any installment payments provided for by the plan, or to extend or shorten the time for payments where, after a hearing, the circumstances seem to warrant.

Before the plan will be confirmed, it must be accepted by a majority in number and amount of the creditors; and the court, as in the case of other types of arrangements, must be satisfied

that the plan is for the best interests of creditors; fair, equitable, and workable; and, of course, that the proposal was made and accepted in good faith. Special precaution is taken to see that claims of creditors are free from usury, creditors being required to present proof to that effect.

Upon confirmation, the plan becomes binding on the debtor and all his creditors, whether affected or not. The court retains jurisdiction until the plan is carried out. When the debtor has fully complied with the provisions of the plan and completed his payments thereunder, the court issues an order discharging him from all his debts except such as are not dischargeable under Section 17 (see § 30) held by creditors who have not accepted the plan.

If you have read carefully what has been said in the preceding pages, you know that the person who is laboring under a heavy burden of debt is given a choice under our present bankruptcy law. He may file a voluntary petition in bankruptcy, turn over all his assets to the bankruptcy court, and be discharged from all his provable debts. He may do this whether he is insolvent or not. If he commits an act of bankruptcy, while insolvent, his creditors may throw him into bankruptcy and, as a result of the proceeding, he may receive a discharge which will be a defense if he should be sued on any of his provable debts.

But without being declared a bankrupt, the debtor, if he is insolvent or unable to pay his debts, may take advantage of one of the bankruptcy laws to make an arrangement with his creditors; and he may have put into effect practically any adjustment of his indebtedness that is fair and equitable and to which the requisite proportion of his creditors will agree. The possibilities include: (1) A scaling down of his indebtedness to bring it within reasonable limits for him to pay; (2) an extension of time for payment of his debts so as to make it possible for him to pay; (3) a combination of (1) and (2)—that is, a scaling down and an extension of time so as to permit him to pay the smaller amount out of his current earnings.

If he owns real property subject to liens, the rights of the lienholders may be modified within reasonable limits. If he is a wage earner, his debts may be scaled down to reasonable limits

and arrangements made to pay them out of future earnings by installments under the supervision of the court. And after the arrangements thus worked out with the assistance and under the supervision of the court have been carried out, he may be discharged from all his provable debts. In whatever way he obtains his discharge, he can no longer be harassed by his old creditors but may begin with a clean slate and, through the arrangements, may still have some part of his business or other means of making a living. If the debtor is a corporation, it is possible to make similar adjustments with respect to debts and to effect a complete reorganization of the corporation under the supervision of the court with, if desired, an entirely new financial structure. By these means the Federal Bankruptcy Act of 1938 extends a helping hand to the distressed debtor.

## CHAPTER XVIII.

## THE REGULATION OF TRADE.[1]

**§1. The power to regulate trade.** The Constitution of the United States has conferred upon Congress the power to regulate commerce with foreign nations and among the several states.[2] The legislatures of the several states, without any specific grant, have power to make laws regulating local business, intrastate commerce or trade within their boundaries. This power may be limited by the constitution of the particular state—but state regulations are valid unless they conflict with the constitution of the state or of the United States.

As the United States grew in population and wealth, business and industry increased, and the processes of doing business became more and more complicated. The form of business organization known as the corporation became very popular. Large accumulations of capital came under the control of single corporations. Monopolies or near monopolies came into existence by the use of trusts and by the development of corporate holding companies—and by various other means. Means were found or invented whereby to restrain or prevent the wholesome effect of competition. To prevent or hold in check these harmful practices—the Congress and the legislatures of the several states have enacted numerous regulatory laws. Some of these laws are discussed briefly in this Chapter.

**§ 2. Antitrust laws.** The first serious attempt to regulate business calling for attention here is the Sherman Antitrust Act, enacted by Congress in 1890. It declares illegal contracts, combinations, or conspiracies in restraint of interstate or foreign commerce, and makes it a misdemeanor punishable by fine or imprisonment or both to make such contracts or engage in such combinations or conspiracies or to monopolize, attempt to monopolize, or to conspire or combine with others to monopolize

[1] Chapter added by publisher's editorial staff.

[2] U. S. Constitution Art. I, Section 8 § 3.

any part of interstate or foreign trade. It gives the Federal courts power to prevent, restrain, and punish violations of the Act. The United States Supreme Court has so construed this Act that it prohibits only "Unreasonable restraints of trade."[3]

The Sherman Antitrust Act applied only to interstate and foreign commerce—Congress had no power to regulate purely intrastate commerce. To prevent trusts and monopolies and unreasonable restraints of trade where purely local business is involved, most of the states have enacted antitrust laws. These are intended to accomplish the same purposes with respect to intrastate commerce as the Sherman Act is intended to accomplish with respect to interstate and foreign commerce.

**§ 3. The Federal Trade Commission Act.** This became a law in 1914. It declared unlawful unfair methods of competition in interstate and foreign commerce. It has since been amended to declare unlawful unfair or deceptive acts or practices in such commerce. Note that the unfair methods first declared unlawful were unfair methods of competition, but the unfair or deceptive acts or practices are made unlawful whether competition is involved or not.

The Act does not undertake to define "unfair methods of competition" and "unfair or deceptive acts or practices." It leaves this to the Federal Trade Commission, which it creates, under the supervision of the courts. It is a part of the Commission's task to work out, in the first instance, the line between what are fair methods of competition and what are unfair, and what are unfair and deceptive acts or practices and what are not. The final determination must be made by the courts by "the gradual process of judicial inclusion and exclusion." But it may be said generally that practices which are contrary to good morals because they involve deception, bad faith, fraud, or oppression are unfair methods of competition.

The following are given as illustrations of what are considered unfair methods of competition and unfair and deceptive acts and practices:

1. False or misleading advertising concerning and misbranding of commodities respecting ingredients, quality, purity,

[3] Standard Oil Company v. United States, 221 U. S. 1.

origin, attributes, or properties, and selling under such names and circumstances as to deceive the public.

2. Representing that goods are made in the United States when the whole or an important part was produced elsewhere.

3. Procuring business or trade secrets of competitors by means of spies or by bribing their employees.

4. Making false and disparaging statements about the products or business of a competitor under the guise of ostensibly disinterested and specially informed sources or through purported scientific but misleading demonstrations.

5. Passing off goods as those of a competitor by simulating his trade names, labels, packages, etc.

6. Selling as new, rebuilt secondhand articles.

The Federal Trade Commission is given power to enforce the provisions of the Act and the provisions of certain other regulatory Acts by issuing "cease and desist" orders after a proper hearing. Any person against whom a "cease and desist" order has been issued may obtain a review in the United States Circuit Court of Appeals by filing a petition within sixty days after he is served with the order.

**§ 4. Antiprice discrimination laws.** In 1914, the same year in which the Federal Trade Commission was created, Congress enacted what is known as the Clayton Act. This Act, among other things, declared unlawful the following whenever they might tend substantially to lessen competition or create a monopoly:

(a) Discrimination in price; and

(b) Leasing, selling, or contracting to sell commodities, or the fixing of a price therefor, or a discount from, or a rebate on, such price on condition that the lessee or purchaser should not use or deal in the commodities of competitors of the lessor or seller.

The enforcement of these provisions so far as ordinary commercial transactions are concerned is intrusted to the Federal Trade Commission.

The Clayton Act was amended in several important particulars by the Robinson-Patman Act[4] in 1936, and has become one

[4] U. S. Code, Title 15, Section 13.

of the most important of the regulatory laws relating to business. Its scope and chief provisions are here indicated:

1. The law declares it to be unlawful for "any person" to do the acts prohibited. The word "person" as used here includes corporations and associations as well as natural persons.

2. To be unlawful within the provisions of the Act, the acts must be committed in the course of commerce among the several states or with foreign nations.

3. The discriminations declared to be unlawful are:

(a) Discriminations in price between different purchasers of commodities of like grade and quality where the effect may be substantially to lessen competition or tend to create a monopoly in any line of commerce or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit, or with customers of either of them.

In connection with this, consider the following:

(1) That differences in price are permitted which merely make allowance for differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which the commodities are sold or delivered to the purchaser.

(2) That the seller has the right to select his own customers in *bona fide* transactions not in restraint of trade.

(3) That prices may be changed to meet changing conditions affecting the market or the marketability of the goods.

(b) Leasing, selling, or contracting for the sale of goods whether patented or not, fixing a charge therefor, fixing a discount from, or a rebate upon such price—on condition or understanding that the lessee or purchaser shall not use or deal in the goods of a competitor or competitors of the lessor or seller.

(c) Paying or granting, or receiving or accepting, anything of value as a commission, brokerage, or other compensation or any allowance or discount in lieu thereof except for services rendered in connection with the sale or purchase of the goods, either to the other party, or to an agent or other intermediary where the intermediary is acting for or is subject to the direc-

tion or control of any party to the transaction except the party by whom the compensation is granted or paid.

(d) Paying anything of value to or for the benefit of a customer for services or facilities furnished in connection with processing, handling, sale, or offering for sale any products or commodities manufactured, sold, or offered for sale by such person, unless such payment is available on proportionately equal terms to all other customers competing in the distribution of such products or commodities.

(e) Discriminating in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish, furnishing, or contributing to the furnishing of any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionately equal terms.

4. It is declared to be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by the Act.

There is a criminal section in the Act which provides for a fine of $5,000, or imprisonment, for not more than one year or both for knowingly being a party to, or assisting in, any transaction or sale which discriminates against competitors of the purchaser in that any discount, rebate, allowance, or advertising service charge is granted to the purchaser not available at the time to the competitors.

The same penalty is imposed also for selling goods in any part of the United States at prices lower than those exacted by the seller elsewhere in the United States for the purpose of destroying competition or eliminating a competitor, and for selling goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Antidiscrimination Acts, also known as Unfair Practice Acts, have been passed in more than half of the states of the Union. They have been passed to extend the same kind of regulation to local or intrastate trade as that imposed on interstate commerce. In addition—many of these prohibit sales below cost for

the purpose of injuring competitors or destroying competition.

The Robinson-Patman Act is of special interest to the accountant. Like the Federal income tax laws, it makes it advisable for the businessman to keep adequate records. Both buyer and seller may be called upon to justify discriminations. In order that they may be able to do so, they must maintain adequate cost records in accord with accepted accounting principles. Selling and distribution costs must be analyzed as carefully as production costs. The emphasis on these three major divisions of costs broadens the whole field of the work of the cost accountant and adds a note of legal necessity to the concept of cost accounting as a tool of management. The Act does not require the maintenance of cost records, but the seller may find it necessary as a practical matter to keep such records so that he may be able to justify his discount practices.

The Federal Trade Commission has recognized the importance of cost accounting in the administration of the Robinson-Patman Act and has recommended further study in that field.

**§ 5. Resale price maintenance laws.** As a result of a long line of judicial decisions, it has become a well-established rule of law that, in the absence of a statute to the contrary, a person who sells any kind of goods, wares, or merchandise cannot prevent their resale by the buyer nor control the price at which they may be resold. Contracts between buyer and seller which undertake to restrict the sale or to fix or control the resale price are held to be illegal and void as an unreasonable restraint of trade at common law, and where they involve interstate commerce they are in violation of the Sherman Antitrust Law.

Many plans have been worked out and put into effect to avoid the effect of the rule of law mentioned above without success. Beginning about 1935 the legislatures of a few states were prevailed upon to enact resale price maintenance laws, more commonly known as "Fair Trade Acts." These laws were not uniform—but generally contained at least two provisions. These were substantially that no contract relating to the sale or resale of a commodity which bears the trade-mark, brand, or name of the producer or owner and which is, in fair and open competition with commodities of the same general class produced by

others shall be deemed to be in violation of the law of the state by reason of its containing:

(1) A provision that the buyer will not resell except at the price fixed by the vendor; or—

(2) A provision that the producer or vendee of the articles or commodities sold will on the sale of such commodities, require the purchaser to agree that he will, in turn, not resell except at the price stipulated by the producer or vendee.

In other words the "Fair Trade Acts," legalize price-fixing agreements with respect to branded or trade-marked articles.

These laws also include provisions by which, under certain circumstances, the buyer may resell without reference to the agreement. Thus if it should become necessary for the owner to close out his entire stock of such goods—he would have the right to offer the goods to the manufacturer at the original invoice price—and if the offer was not accepted, he could proceed to sell at any price he could get. Or if the goods should deteriorate, the buyer would no longer be bound by the price-fixing agreement.

These laws were upheld by the United States Supreme Court[5] and within a few years all the states except Missouri, Texas, and Vermont had enacted similar laws.

The "Fair Trade Acts," being state laws, could have no effect on interstate commerce. Contracts for the sale of goods in interstate commerce containing these price-fixing agreements were still void as in violation of the Sherman Antitrust Act, even though the States in which both buyer and seller had their places of business had enacted "Fair Trade Acts." To remedy this situation, the Miller-Tydings Act was passed by Congress amending Section 1, of the Sherman Act so as to legalize contracts in interstate commerce fixing resale prices where under the laws of the state in which the resale is to be made or to which the commodities are to be transported for resale such contracts are lawful.

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[5] Old Dominion Distributing Company v. Seagram Distillers Corporation, 299 U. S. 183.

# QUESTIONS IN

## BUSINESS LAW.

### Contracts.

1. Arnold says to Bates, "I will give you $1,000 if you will marry within the next two years." Bates does so. What kind of contract is this? Page 2.

2. Jones made Smith an offer. Smith wrote his acceptance and mailed it. Then he decided to call it off and telegraphed Jones to that effect. Jones got the telegram before he did the letter. May he hold Smith to the contract? Page 5.

3. Doe said to Crane, "I will sell you 100 shares of XY stock at $50." Crane said, "I'll give you $45." Doe said nothing, but an hour later sends around a certificate for 100 shares and a bill for $4,500. May he hold Crane? Page 6.

4. A patent medicine company published an advertisement as follows: "We will pay $500 for any case that is not helped by our celebrated specific." Jones took their medicine and was not helped. May he recover the $500 from the company? Page 7.

5. Dale in New York wired White in San Francisco: "I will give you the position of superintendent at $10,000 a year. Come on at once and arrange details." White came on at once at considerable expense, but when he reached New York, Dale was dead. May he enforce any claim? Page 10.

6. Abbott subscribed for a set of Dickens' works, the publisher agreeing to deliver one volume a month and Abbott agreeing to pay the price, $25, on the delivery of the last volume. He did not do so and finally the parties signed a statement that "it was mutually agreed that Abbott should have three months from date in which to complete his payments." Three weeks later

the publishers sued him for the $25. Has he a defense to the suit? Page 12.

7. The husband of a murdered woman, being extremely anxious that the murderer who is being tried shall be convicted, says to the district attorney who is prosecuting the case: "If you will get a conviction in this case I will pay you $500." The district attorney gets a conviction. Is he legally entitled to the $500? Page 13.

8. A debtor went through bankruptcy and secured his discharge. Later he voluntarily promised one of his creditors to pay him in full. May the creditor hold him to this promise? Page 15.

9. May a man be held to a contract made while intoxicated? Page 17.

10. An executor of an estate bought on credit some flowers for the funeral. His promise to pay for them was not in writing. May it be enforced against him? Page 19.

11. Is an agreement to sell standing grain one that is covered by the statute that all contracts for the sale of any interest in land must be in writing? Page 20.

12. An advertising agency agreed with a manufacturer to run an advertisement for him for three months in a certain magazine. They did not do so. May the magazine sue for what it would have made on the advertising? Page 22.

13. Can an action for breach of contract to marry be legally assigned to a third person? Page 23.

14. Bryan had a claim of $500 against Green which he assigned to Fox. Green thereafter paid Bryan. May Fox now collect from Green? Page 25.

15. Suppose the contract had a clause that the auto was to be satisfactory to Fort and it was not satisfactory to Fort, but he was unreasonable. Could Hill collect the price? Suppose Fort told Hill it was not satisfactory but admitted to others that it was. Could Hill collect? Page 28.

16. Gray hired Swift as a gardner for a year at $30 a month. Later they agreed that Swift's pay should be $25 a month. It turns out that at the time Swift made the second contract he was so intoxicated that he did not know what he was doing. May

he still collect $30 a month or is Gray freed from all liability on the contract? Page 31.

17. Parker owed White $150 for a horse. White dunned him and Parker gave him his note payable 30 days from date. The note is not paid. May White sue on the original debt or only on the note? Page 33.

18. The proprietor of a general merchandise store in a country town sold it out to Yoe and agreed not to open a similar store anywhere in that county or any adjacent county. Is the agreement binding? Page 36.

19. Allen was injured by a railroad company. His doctor advised him to sue and Allen said he would give him $10 if he would pick out a good lawyer and get him to bring action. The doctor went to Smart, a lawyer, and offered him the case if he would give him (the doctor) $50, to which the lawyer agreed. The patient found this out and refused to pay the doctor the $10. Was he justified in so doing? Page 38.

20. Nolan contracted to drive a well for Evans to the depth of 300 feet. At a depth of 150 feet an impassable ledge of rock was encountered. May Evans recover from Nolan for breach of contract? Page 40.

21. Gould contracted to raise and sell to Hale 1,000 bushels of corn. Before the corn which Gould had planted was ready for harvesting, it was wholly destroyed by a cyclone. May Hale recover from Gould for breach of contract? Page 42.

22. Fox was negotiating for a typewriter with Pierce, who told him that the margin of profit was smaller on that machine than on any other in the market. Such was not the case. May Fox rescind the contract after he has entered into it? Page 43.

## Agency.

1. What is the difference between the relation of principal and agent, and that of master and servant? Page 45.

2. Ray, Jones and Smith and 30 others organized an informal shooting club, called the South Shore Gun Club. They held a meeting at which two-thirds of the members were present and by a majority but not unanimous vote, authorized Ray to buy 300 decoys. He did so. Subsequently the seller sued the

club for the price of the decoys. What members of the club are liable? Page 46.

3. White rang up Todd on the 'phone and told him to go down to Dale's office and there sign a deed for White. Todd did so. Does the signature bind White? Page 51.

4. Green listed his house for sale in Olsen's real estate agency. Shortly thereafter Green died, but Olsen was not notified of this fact and later sold the place to Young. What are Young's rights and against whom? Page 55.

5. Suppose that Green had been indebted to Olsen in $5,000 for money advanced by Olsen to buy the house and that Green had listed the house with Olsen to sell it and to get back his $5,000. What would have been the effect of Green's death on Olsen's power? Page 56.

6. An employer hired a superintendent, being careful to choose a man of good reputation. The superintendent became intoxicated and allowed some defective machinery to be installed, as a result of which an employee was killed. Is the employer liable? Page 61.

7. An apprentice on his first day of work was set to work on a defective machine which injured him. Had he assumed the risk so as to exonerate the employer? Page 63.

8. White and Young are working together pitching hay on a wagon, both being employed by Doane. White is injured by Young's negligence. May White recover from Doane? Page 64.

9. Would a telephone exchange operator be able to recover against the telephone company if he were injured by a shock caused by the negligence of a lineman in insulating some feed wires in the dynamo room? Page 67.

10. Lear was an employee of a steamship company and was employed in unloading a vessel. He was injured by the negligence of a gang of painters who were also employed by the company in painting the vessel. Is Lear barred by the fellow servant rule from recovery against the company? Page 68.

11. Scott hired Thorpe as his lawyer to attend to a collection. Thorpe was busy and turned the case over to Coke, another lawyer. Has Scott a cause of action against Thorpe? Page 72.

12. Hicks, a clerk in Field's store, saw a sneak thief escap-

ing with some goods and ran after him to arrest him. Finding that he could not catch him he threw a stone to disable him, which hit Todd, a passerby, and put out his eye. Is Field reponsible for the injury to Todd? Page 74.

13. Dill, a clerk of the XY Company, who had charge of the certificates of stock, duly signed, and which required only to be filled out, fraudulently issued one for 100 shares to White, who sold it to Scott, who bought it in good faith, White and Dill keeping the money. Is Scott's redress against the company or only against Dill? Page 78.

14. A committee of Dill, Gray and Adams were gathering flowers for a church festival. Murphy lent his automobile and chauffeur to Dill for the day. While bringing the flowers to the church the chauffeur negligently ran down and injured Thayer. Who is responsible therefor, Dill or Murphy? Page 80.

15. Hanks owns a flat building in Chicago and puts it in the hands of Allen, a real estate agent. It is the usual course of business to repair the flat for the tenant, but Hanks told Allen not to do so. Allen leased a flat to a tenant and agreed to repair it for him. Is Hanks bound by this agreement? Page 83.

16. Has a purchasing agent power to buy on credit? Has he power to agree that the goods shall be shipped by some particular route? Page 85.

17. What is the difference in the powers of a factor and a broker? Page 87.

18. Yates had for several years acted as the agent of a company selling farm machinery and had sold several pieces of machinery to Tidd, sometimes taking cash and sometimes Tidd's note. The company finally sent out instructions to all agents to sell only for cash. Thereafter Yates sold Tidd a cultivator and took his note. The company demanded either cash or a return of the cultivator. May they compel Tidd to do the one or the other? Page 88.

19. Fales was running a roller-skating rink in his own name, but really as an agent of Olsen. Olsen had instructed him to spend no money except what was necessary for the purchase of roller skates. Fales hired Murphy as janitor of the rink. Fales later absconded without paying Murphy, who on discover-

ing Olsen's connection with the rink sued him for his wages. May he recover? Page 90.

20. Brown bought land from French, nominally for himself, really for Lord, who was not mentioned. Lord gave the purchase price to Brown, who did not pay French. Thereafter French discovered that Lord was really the purchaser and sued him for the price. May he recover from Lord? Page 92.

21. Suppose French, in the last case, had first tried to collect by suing Brown; could he thereafter, when he discovered Lord's connection with the case, dismiss the suit against Brown and bring suit against Lord?

Could he do so if he had already known of Lord's connection before bringing his suit against Brown? Page 93.

22. White, a brewer, put Maine in charge of a saloon. Maine sold the glassware, cash register, etc., to Hull, who thought that Maine was the owner and paid him cash therefor. May Hull retain the property as against White? Page 97.

23. Fox and White made a contract in writing whereby White agreed to sell Fox a certain piece of land. The contract was signed by White and Fox. May Lynch, Fox's principal, sue upon the contract in his own name if Fox during the negotiations had told White that he was acting for another? Page 98.

24. Would it make any difference in the last case if the agent had expressly stated in the contract that he was acting on his own behalf and not as agent? Page 100.

25. Thayer, the owner of a paper, ordered Allen, the editor, to insert a libelous statement about White. Allen did so. May White sue Allen for the libel? Page 101.

26. Lane goes to White and says, "I will give you $5,000 for your land. You understand I am not acting for myself, but for a principal, although I am not at liberty to give his name." White accepts the offer. May he hold Lane personally liable on the contract?

May he do so if he found out from another source that Lane was really acting for Peterson? Page 105.

## QUIZ QUESTIONS

### Torts.

1. Evans drives an automobile down a crowded street at the rate of 40 miles an hour and injures Dane. Is this tort based on intent, negligence or accident? Page 106.

2. If the reason why Evans had so driven was to catch a train, would that have been his motive or intent? Page 107.

3. Finch is mining on his own land and runs the mine under Dean's land. Is Finch guilty of trespass on Dean's property? Page 107.

4. Fair's watch was lying on his desk and Ellis turned it around to see what time it was. Is Ellis guilty of trespass? Page 109.

5. What is the legal difference between mistake and accident? Page 109.

6. Brown shakes his fist in Tidd's face and calls him a liar and Tidd knocks him down. Is Tidd justified in so doing? Page 110.

7. A tramp came upon May's porch and refused to leave when ordered. May kicked him off the porch and broke his leg. Is May liable in an action of tort? Page 112.

8. Olsen's buggy broke down and he backed it on Ide's land for the night. Ide found it there and put it out in the road and it was stolen. Is Ide liable to Olsen for its value? Page 113.

9. A tenant whose lease had run out refused to vacate. The landlord entered and removed him, using no more force than was necessary. Is he liable for so doing? Page 114.

10. Ellis got a loan of $100 from Hull, saying that he would return it in a week. He did not at any time return it. May Hull sue him for deceit? Page 117.

11. In order to induce Fales to give credit to White, Young told him that he was perfectly sure that White had never been through bankruptcy and never defaulted on an obligation. Upon the strength of this statement Fales lent White money. In fact, he had been through bankruptcy and later defaulted on Fales' loan. May Fales sue Young for deceit? Page 119.

12. Doe was floating a corporation to promote prize fighting in Utah and wrote to Hale in Massachusetts asking him to subscribe for some stock and saying, "The law of Utah allows prize

fighting and there is no doubt that the whole scheme is legal." In fact, the law of Utah did not allow prize fighting. Is this actionable deceit? Page 122.

13. Gray is driving down the street in a grossly negligent fashion; Thomas is also driving in a negligent fashion but not so negligently as Gray. They collide and Thomas is injured. May he recover any part of his damages from Gray? Page 126.

14. Suppose in the case last given that though both Gray and Thomas were negligent, Gray had seen the situation at the last moment and could still have stopped in time to avoid the collision but did not do so. Could Thomas recover? Page 127.

15. Ellis had a "merry-go-round" on his land that was out of repair and dangerous. Small children came upon the land without any business there and in playing about the "merry-go-round" were injured. Is Ellis liable therefor? Page 129.

16. Would speaking defamatory remarks about a person into a phonograph and so impressing them on the cylinder be slander or libel? Page 132.

17. Why is it that in action for slander it is generally necessary to prove special damage whereas such is not the case in an action for libel? Page 132.

18. What kinds of defamatory remarks are actionable without proof of special damage? Page 133.

19. Fox says, "Ide told me that Cole (a merchant) is on the verge of bankruptcy." Cole is not on the verge of bankruptcy and sues Fox for slander. Is it a defense that Fox only purported to repeat what Ide had told him? Page 134.

20. A book reviewer says of a certain book supposed to be original, "By actual count over two-thirds of the contents of this work consist of extracts stolen from other works." This is not true in fact. Is it privileged? Page 135.

21. Dill learned that Fox, his lawyer, was thinking of taking Gray as a partner and wrote to Fox, "I hope you won't take Gray in; you have my business and I shall keep it with you but I don't regard Gray as square and I should be constantly in fear that he would turn traitor." Dill made these statements in good faith, but in fact Gray was a high-minded, honorable attorney. Fox refused to take him in as a consequence of this letter and Gray sued Dill for libel. Has Dill a defense? Page 138.

22. A woman discharged her servant. Learning that a stranger in the town was about to hire the servant, she wrote saying that the servant was incompetent, thievish, and untruthful. In fact this was not true though the woman had seen things that made her so believe and she wrote in good faith. Is she liable in an action for libel? Page 138.

23. Gay is employed by Beach as a travelling salesman. His employment is for a year. Before the year is up, Chase believing that the work is breaking down Gay's health induces him to break his contract. Gay is a particularly good man and Beach is seriously damaged by his leaving his position. Has Beach a right of action against Chase? Page 142.

24. Strikers station pickets in front of the employer's factory and they threaten to beat any one who tries to enter and by that means keep other employees away. May the employer enjoin this? Page 145.

25. What is the difference in legal principle between the case where the members of a labor union go on a strike and refuse to work unless their employer hires only union labor and the case where they refuse to trade with Gray unless Gray will refuse to sell to the employer against whom they are striking? Page 147.

26. Abbot, Barnes and Chase are employers. They agree that they will none of them employ laborers who have been discharged from each other's employment. Is such an agreement unlawful? Page 152.

27. Abbot, Barnes and Chase are employees. They agree that they will none of them work for an employer who has discharged any of them. Is such an agreement unlawful? Page 153.

### Personal Property and Bailments.

1. To which of the two representatives of the deceased, heir or executor, would the following pieces of property go on the death of the owner: An acre of land, shares of stock in a corporation dealing exclusively in real estate, an annuity, a lease for 10 years, a mortgage that was not yet due, the fish in a fish-pond on the property, a collection of mounted fish? Page 160.

2. What is the difference between a "chattel personal" and a "chattel real"? Page 162.

3. Snow, being under a mistake as to the location of the boundary between his land and Todd's, went on Todd's land and cut and hauled away lumber worth $100 as it stood. He made it into furniture worth $1,500. Assuming that Todd can identify the furniture as made from his lumber, who is entitled to it? Page 166.

4. Suppose the fence between Dane's land and Hale's land was blown down by a storm and 300 sheep belonging to Dane and 500 belonging to Hale were mixed together, what would be the respective rights of Dane and Hale in the mixed flock? Page 167.

5. Jones, Finch and Gray each deposited 5,000 bushels of grain in Young's warehouse. The grain was all in one common bin. Suppose the building and 10,000 bushels of grain are burned, with no insurance. On whom does the loss fall? Page 168.

6. Suppose in the above case Young had given a receipt that allowed him, when the receipt was presented, to return either grain of the same quality or the market value of the grain. Would this have altered the result in case of fire? Page 168.

7. Smith's boat was run down by a tug. When they got into port Smith began proceedings for damages in an admiralty court and attached the tug. The decree of the court directed that the tug should be sold to satisfy Smith's claim. It was sold and bought in by Hall. It later turned out that at the time of the collision the tug was in the hands of a thief who had stolen it from the true owner. As between the latter and Hall, who is entitled to the tug? Page 171.

8. Fales sued Jones for breach of contract and got a judgment for $100. He told the sheriff to levy on and sell a horse that Jones had been using. The sheriff did so and Thayer bought the horse, which in reality belonged not to Jones, but to Murphy. As between Murphy and Thayer, who is entitled to the horse? Page 173.

9. Has a livery stable keeper a lien at common law? Page 175.

10. Fogg called an expressman to move his furniture, the latter agreeing to do the job for $15.00. It took three trips to carry all the furniture. On the last trip the expressman delivered all but a sideboard, which he claimed to hold till the $15.00 was paid. Fogg tendered him $5.00, the charge for carrying the last load

claiming that he had lost his lien for the other two loads by delivering them. Is Fogg right? Page 178.

11. A thief stole a lot of diamonds and delivered them to an express company to carry out of the state. The express company acted in good faith. The owner discovered them and demanded them from the express company and the latter claimed to hold them for charges. May it do so? Page 179.

## Sales of Personal Property.

1. Doane says to Winslow, "I will sell you my horse and buggy for $150, when you have a stable large enough to accommodate them." Winslow says, "I accept your offer." Does this amount to a sale of the horse and buggy? If not, what is its legal effect? Page 182.

2. Brown, a dealer in shoes, telephoned Green, a shoe manufacturer on a small scale, and said to him, "I want you to ship me at once 500 pairs of your shoes, style 'XX,' in assorted sizes." Green said, "That is one of our stock patterns, but I haven't any made up now, but I can make them for $500 and ship them to you in a week if that will be satisfactory." Brown said, "All right." Green made the shoes and Brown then refused to take them and when he was sued set up that the contract was not in writing. Is his defense good (a) in states that follow the English rule? (b) In states that follow the Massachusetts rule? (c) In states that follow the New York rule? Page 188.

3. Baker was trying to sell Gates his auto. He showed it to the latter as it stood in the garage. Gates looked it over and then Baker said: "Make me an offer." Gates said: "I'll give you $350 for it." Baker said, "It's yours" and Gates said, "All right." The next day Gates told Baker that he had decided to call the deal off. May Baker hold him for the sale? Page 192.

4. Wolf, a member of a stock exchange sells to Lamb, another member, 100,000 bushels of wheat at 60 cents a bushel to be delivered in 30 days, Wolf at the time having no wheat. Is this sale illegal?

Would it make any difference if neither Wolf nor Lamb ever intended to actually deliver or receive the wheat? Page 195

5. Bates, a storekeeper, sold out his entire stock to Gray for

$15,000, the title to pass July 1st, Bates remaining in possession till then. June 30th, a fire destroyed about one-third of the stock and damaged the rest. What are the respective rights and obligations of Bates and Gray? Page 196.

6. Howe bought a horse from a dealer who guaranteed him to be gentle and fit for ladies to drive. While Howe was trying him before the sale the horse snapped at him twice, and became frightened at a train. May Howe later recover from the dealer on his warranty if it turns out that the horse is not gentle or fit for ladies to drive? Page 198.

7. Dale wrote to a tire manufacturing company telling them to send him four tires for an auto race. The company sent the tires and in the race one of them burst because of the defect in the rubber, thereby damaging the car. May Dale recover from the company for the damage? Page 201.

8. Hill made Jones, a farmer, an offer of $17 a ton for all the hay then in his barns. Jones accepted the offer. The same night the barns and contents were destroyed. On whom does the loss fall? Page 203.

9. White ordered from Jones, in Chicago, a dozen typewriters, price to be charged. Jones wrote: "Order received and will ship at once." Jones delivered the typewriters to the railroad, but in the bill of lading named himself as consignee, and kept the bill of lading. While the goods were on the way to White, Jones stopped them and sold them to Lewis. What are the rights of White (1) against Jones? (2) Against Lewis? Page 210.

10. Adams stepped into an auction room. There was a picture up for sale and a bid of $15 had just been made. Adams bid $17. No higher bid was received and the auctioneer said he would withdraw the picture. May Adams get it on tendering the $17? Page 212.

11. Clark, in New York, bought of Small, in Iowa, 5,000 bushels of potatoes to be delivered in New York. Small shipped 4,000 bushels which Clark accepted. What is his liability to Small? Page 219.

12. Davis ordered 500 tons of coal from Evarts specifying that it should be free burning and with no clinkers or cinders. The coal was delivered to Davis who, to see if it came up to the

specifications, burned a half a ton of it. It left clinkers and cinders and he refused to accept it. Is he liable for the half ton burned? Page 221.

13. Dale owed Kline $500 for goods purchased and gave Kline his note for $500 payable in 30 days at 6%. When it came due, Dale could not meet it. May Kline sue on the original claim for $500 or only on the note? Page 224.

14. Barnes sold $1,000 worth of potatoes to Colt on 90 days' credit and shipped them to him. Just after they were shipped he discovered that Colt had gone into bankruptcy. May he reclaim the goods from the railroad and hold them until paid cash? Page 226.

15. Suppose that after Barnes had stopped the potatoes in transit, on the facts in the last question, he had found that they were spoiling and to prevent loss had sold them to Hicks for $900. What would be the right of Colt (1) against Hicks? (2) Against Barnes? Page 229.

### Chattel Mortgages.

1. What is the difference between a pledge and a chattel mortgage? Page 236.

2. Bates owned a tract of land on which was a sawmill. He bought from Gill a boiler and engine, gave him a chattel mortgage back for the purchase price and then built them into the sawmill. Some time before this, Bates had given Gray a mortgage on the land and mill. Two years later Bates became insolvent, both Gray and Gill being unpaid, and each claiming the boiler and engine under his mortgage. Which had the better right thereto? Page 240.

3. Dale mortgaged to Hill his horse and buggy, but Dale still kept possession of them. The mortgage was not recorded, although there was the usual chattel mortgage act in the state. Later Hill found that Roe, a creditor of Dale, was about to attach the horse and buggy as Dale's property, and compelled Dale to give him (Hill) possession. Is this enough to make the mortgage good as against Roe? Page 241.

## Title to Real Estate.

1. What are the essential parts of a deed? Page 245.

2. Luce owned a farm. He executed a deed of part of it to Roe. The land was described thus: Beginning at the Northeast corner of my dwelling house, and thence running in a northeasterly direction 500 feet to the corner of the stone wall; thence West 1,000 feet to the southeast corner of John Guy's land; thence due South to the point of beginning containing 12 acres." The distance from the corner of the stone wall to the Southeast corner of Guy's land was 1,700 feet; and from that point to the point of beginning was not due South but East-South-East, and the total area embraced by a line extending to the Southeast corner of Guy's farm, then back to the point of beginning was 18 acres. Luce claimed that all Roe was entitled to was to measure off from the corner of the stone wall 1,000 feet in the direction of the Southeast corner of the Guy land and then go about South to the point of the beginning which would give about 11 acres. Roe claimed that he was entitled to the larger tract. Which was right? Page 246.

3. Into what classes and subclasses are estates in real property commonly divided? Is an estate for 999 years an estate of freehold? Page 250.

4. Todd owned a wood lot and back of it a farm lot. There was a well defined and frequently used lane running from the farm lot over the wood lot to the highway. Todd sold the farm lot to Fox "together with all the appurtenances thereunto belonging," but not giving Fox in express language a right of way over the wood lot. May Fox continue to use the way if Todd objects? Would it make any difference if there was no other access to the farm lot? Page 252.

5. If in the last question Todd had kept the farm lot and conveyed the wood lot to Fox, could Todd have exercised the right of way over the wood lot, assuming that it was not a way of necessity? Page 253.

6. What is meant by the doctrine that "covenants of title run with the land"? Page 266.

7. John Doe was going to make a gift of one of his farms to his son Richard. He drew up, signed, sealed and acknowledged

the deed and then gave it to his son Richard and said "take this down to the office of Hill, my lawyer, and ask him to keep it for me." Richard did so and Hill took and kept the deed. Six months later John Doe died insolvent and his creditors sought to sell the farm in question as being his property. Can Richard successfully assert a title to it under the deed? Page 268.

8. What are the more important differences between the various kinds of recording acts? Page 271.

9. Dale agreed to sell a tract of land to Hill, who recorded his contract. Dale then sold the land to Chase and gave him a deed to it, which Chase recorded. Chase paid full value and did not know of Hill's prior contract. Dale then gave a deed to Hill. Which one is entitled to the land? Page 272.

10. What are the weaknesses of the ordinary system of recording titles to land? Page 275.

11. What are the results sought by the Torrens system of registration, and what are the steps taken to bring about these results? Page 278.

12. Mention the more important general advantages of the Torrens system of registration. Page 282.

13. What are the rights of husband and wife in "community property"? Page 286.

## Real Estate Mortgages.

1. What are the differences in legal theory between the view that a mortgagee has title to the land and the view that he has only a lien thereon? Page 292.

2. Fox executed a deed of his house and lot to Luce for $1,200. The place was worth about $2,000. At the same time and as part of the transaction Luce wrote Fox a letter whereby he gave Fox a legally binding option to buy the place back at any time in the next 18 months for $1,500. Fox did not buy back in the next 18 months, but two years after the deed he brought proceedings to have the deed declared a mortgage and to be given the right to redeem on paying $1,200 with interest and costs. The evidence given by Fox and Luce was just evenly balanced as to whether the transaction was really a sale with an 18 months' op-

tion or a mortgage. Should the Court decree in favor of Fox or Luce? Page 295.

3. Hare loaned Doe $3,000 and took a mortgage on Doe's farm. Ball later loaned Doe $2,000 more and took a second mortgage on the farm. Hare then loaned Doe $1,000 more. The farm was then sold by agreement of Hare and Ball to satisfy the mortgages, and brought $4,500. What are the respective rights of Hare and Ball in the money? Page 300.

4. If the mortgagor remains in the possession of the premises and attempts to cut down and sell a large forest of trees, forming the most valuable part of the premises, what relief has the mortgagee?

What are the rights of the mortgagee as to trees already cut (1) in a "lien theory" state? (2) In a "title theory" state? Page 306.

5. Todd held a $6,000 mortgage on Hare's land, the debt being in the shape of four promissory notes of $1,500 each. Todd endorsed one of the notes to Roe and another to Dix. Hare then paid the two held by Todd, and Todd released the mortgage. What are the rights of Roe and Dix against Hare? Page 310.

6. Guy had a mortgage for $2,000 on Mill's land. Mill did not pay the mortgage when due, but three months later paid Guy in full. Is it necessary that Guy should give Mill a deed back of the land to make his title clear?

Suppose that Guy refused to perform the necessary steps to release the mortgage, what redress has Mill? Page 312.

7. Ball executed to Todd his note for $1,000 June 1, 1900, and secured by a mortgage on Ball's house and lot. The note was not paid. Todd did nothing until 1910, when he attempted to foreclose the mortgage. The statute of limitations in the state was five years for actions on promissory notes and fifteen years for actions for the recovery of land. May Todd maintain his action to foreclose? Page 316.

8. Suppose in the last case, that in 1902 Todd had transferred Ball's note to Cox, but no mention had been made of the mortgage. If the note was still unpaid in 1910, who would have a right to foreclose the mortgage? Page 320.

## Landlord and Tenant.

1. Could Wright, a lodger, who had paid in advance for six weeks' lodging, maintain ejectment against the lodging house keeper for turning him out of his room during the six weeks? Page 322.

2. Aldrich leased a farm to Morse. The floor of the barn was in very bad condition and Aldrich knew it. Morse did not. The first day on the farm, Abner, Morse's hired man, drove into the barn and the floor fell with him seriously injuring him. Who is responsible therefor? Page 324.

3. Suppose in the last case that Morse had notified Aldrich that the floor needed repairing and requested him to repair it and Aldrich had refused and then Morse had been injured. Woud Aldrich be liable? Page 326.

4. What are the various ways by which a landlord may collect his rent? Page 329.

## Trusts and Trustees.

1. Smith holds property in trust for Webster. Gray, in ignorance of the trust, purchases the property from Smith, pays Smith the purchase price, and has the property transferred to his wife. Can the wife hold the property freed from the trust? Pages 334, 335.

2. In America, in what manner can constructive notice of a trust in real estate be given to all future transferees? Page 335.

3. Grey orally declares a trust in certain land in favor of Brown. Six months later he admits, in a letter written to a third person, that he holds the property in trust, on the terms stated by him in his oral declaration. Can Brown enforce the trust? If so, from when does the trust date as regards the question of the rights to profits from the land? Page 335.

4. The instrument creating a trust provided that the trustee should deposit the funds in a savings bank, which would have paid 4% interest upon the amount deposited. The trustee, without authority, used the funds in a stock gambling transaction, and made a profit of 10%. Is he entitled to keep the amount earned in excess of 4%? Page 340

### Negotiable Instruments.

1. Richards sells to White a horse with a warranty of soundness, taking in exchange White's promissory note for $100, and also a contract by which White agrees to work for him for six months. Richards assigns the note and the contract to Donlin. The horse proves unsound, whereby the warranty is broken. What are Donlin's rights on the note and on the contract?

Page 342.

2. Suppose, in the preceding case, that Richards, instead of assigning the note to Donlin, had indorsed it in blank and had lost it, and Donlin had found it and had sold it to a bona fide purchaser for value, without notice. What would have been the rights of the latter? Page 343.

3. Which, if any, of the following are good negotiable instruments? Pages 346-356.

"Chicago, July 1, 1909.

Pay to the order of John Carson five hundred dollars. $500.

RICHARD STEVENS."

"Chicago, Feb. 1, 1910.

I have borrowed from Richard Smith One Hundred Dollars ($100).

CHARLES ASHER."

"Chicago, Feb. 1, 1910.

Pay to the order of Robert Morse fifty dollars ($50), if the amount now due and owing to me on account of commissions, on sales made by me last month equals said amount, and charge the same against such commissions.

HARRY BURSON.

To the Lee and Henry Mfg. Co., Chicago."

"$5,000. Buffalo, New York, Aug. 10, 1909.

Six months after date, for value received, I promise to pay to the order of Joseph Weingarten Five Thousand Dollars out of the proceeds of the sale of five thousand (5,000) tons of iron ore now registered in my name at the docks of Norton & Co., in this city.

W. S. BURCHARD."

"$100. Chicago, May 15, 1909.

Ten days after sight, pay to the order of Henry Ashton, One Hundred Dollars and charge to my account.

R. L. MURPHY.

To George Sullivan & Co."

"$1,000. Chicago, Oct. 11, 1906

One year after date, for value received, I promise to pay to the order of myself, One Thousand Dollars, with interest at six per cent per annum

J. H. HAMMOND."

4. In the following note, can the Rockwood Mfg. Co., be held liable as a maker? Pages 357, 358.

"$2,000. Newark, N. J., March 10, 1903.

Thirty days after date, for value received, we promise to pay to the order of L. M. Conley, Two Thousand Dollars.

P. H. ASHTON, President of Rockwood Mfg. Co.

F. O. FISHER, Secretary."

5. Defendant wrote his name on a blank piece of paper and left it with the proper officers of his bank for the purpose of having them use it to identify his signatures. One of the bank employes took the paper and wrote upon it a promissory note above defendant's signature. The paper passed to an innocent purchaser, who sought to hold the defendant liable upon it. What decision? Pages 362, 363.

6. Baker sold to Davidson a horse with a warranty of soundness, and in payment therefor, Davidson made a promissory note to Baker's order, which however he retained in his possession and did not deliver. Shortly afterward, Davidson claimed that the horse was unsound, and refused to pay for it, destroying the note. Baker brought suit against Davidson, declaring upon the note as a lost instrument. What decision? Page 364.

7. Burrows was indebted to Friedman in the amount of $100 on a grocery bill. Friedman drew a bill of exchange on Burrows for $100 payable to the order of Lawson, and delivered it to the latter. Burrows refused to accept the bill and Lawson brought suit against him. What decision? Page 368.

8. What is meant by a general acceptance as distinguished from a qualified acceptance? Can a virtual acceptance be qualified? Page 370.

9. A bill drawn upon Rush & Co., was presented to them for acceptance and acceptance was refused. The payee then took the bill to the defendant with whom the drawer also dealt and the defendant accepted it by writing an acceptance upon the face of the bill in the usual manner. The bill was afterwards negotiated to the plaintiff. Can he hold the defendant as an acceptor? Page 372.

10. What elements must concur to constitute one "a holder in due course" of a negotiable instrument? Page 380.

11. What warranties are made by the seller of a negotiable bill or note? Page 385.

12. Where must presentment be made, when no place of presentment is specified? Page 388.

13. After presentment of a bill to the drawee for payment, and its dishonor, what is the next step which is necessary to fix the liability of the drawer (and indorsers, if any)? Page 392.

14. What is the time within which notice of dishonor must be given, in order to fix the liability of an indorser? Page 394.

15. What is meant by a foreign bill of exchange?

In the case of a foreign bill of exchange, besides presentment and notice of dishonor, what further act must be performed in order to fix the liability of the drawer (and indorsers, if any)? Page 397.

16. Within what time must a check be presented for payment in order to preserve the right of recourse on the drawer in case of non-payment by the bank? Page 399.

17. What is meant by discharge of a negotiable instrument? Page 400.

## Guaranty and Suretyship.

1. What is meant by a surety or guarantor? What are cosureties? Page 403.

2. Is the liability of a surety in anywise affected if the creditor agrees with the principal debtor, without consulting the surety, to extend the time of payment? Page 405

3. The maker of a promissory note secured by a mortgage on realty and endorsed by the defendant as surety requested the holder of the note to release the realty, and the latter, thinking himself sufficiently secured by the note with a surety, did so. Did this affect the surety's liability? Page 407.

4. Plaintiff was surety upon a note given by Randall to the defendant. Being about to pay the note, plaintiff learned for the first time that some time after the note was given Randall gave to the defendant several shares of stock in a corporation to hold as security for the note. Upon paying the note, has plaintiff any right of subrogation in the shares of stock? Page 408.

5. What is meant by contribution?

A surety paid his principal's debt. Afterwards he learned that a second surety had signed the contract some time after he had himself signed, the second surety being also, at the time he signed, in ignorance of the first. Has the first surety any right of contribution against the second? Page 408.

## Partnership.

1. Two persons propose to form a partnership, and in pursuance of their purpose, they employ a lawyer to prepare articles of partnership. Before the articles are signed they embark in the business and contract debts. Are they liable as partners? Page 410.

2. The Salvation Army appoints a committee to make arrangements for its Annual Free Christmas Dinner. Can the members of the committee be held liable as partners for debts contracted in hiring a hall and making other arrangements? Page 412.

3. Has a member of a firm engaged in the business of manufacturing steel rails implied authority to issue promissory notes in the firm name?

Distinguish between a special partnership and a special partner? Page 142.

4. Cole & Black are members of a trading firm. The articles of partnership provide that neither partner shall have power to sign notes for the firm. Cole signs a note in the firm name which

gets into the hands of Scott, who is ignorant of the provisions in the articles of partnership. Is the firm liable on the note? Page 414

5. Williams and White are partners in the automobile business. It is White's duty to test out the new machines. He secretly takes parties with him for two dollars per hour while thus testing. Is Williams entitled to a share of the money thus received? Page 416.

6. Two partners of three engaged in the real estate business attempt to transform the firm into a grocery store. Can this be done without the third partner's consent? Page 418.

7. Abbott and Green are partners in the practice of dentistry. They also keep a supply of tooth-brushes, tooth-pastes, etc., for sale. Can the firm be held liable on a note given in the firm name by one of the partners? Page 421.

8. Adams and White are partners in the grocery business. The awning in front of the store is out of order, so that it cannot be lowered without danger to the plate glass window of the adjoining store. Adams, contrary to White's warning, lowers the awning and breaks the window. Is White liable? Page 424.

9. Atwell is a dormant partner. He retires from the firm but gives no notice. Subsequently Mann, who has previously had dealings with the firm, and Drake become creditors of the firm. Is Atwell liable to either? Page 426.

10. Arnot and Babcock are partners in the bridge building business. The articles provide that upon the death of one of the partners his executor may take his place. Can Arnot's executor be held liable for materials ordered by Babcock after Arnot's death? Page 427.

11. What is the law of limited partnerships founded upon? Page 428.

12. How does a joint stock company resemble a corporation? Page 429.

### Private Corporations.

1. Three shareholders owning all the stock of a banking corporation agree to change the bank into an insurance company. Is such a change lawful? Why not? Page 431.

2. What is the status of an unincorporated society? What is meant by a syndicate? Page 432.

3. Does a promoter become a stockholder of the corporation which he promotes? Does a promoter have a vote in the election of the directors and officers? Page 433.

4. Mason and White each agree to subscribe for fifty shares of stock in a corporation to be formed. Can White be compelled by Mason to so subscribe? What is the consideration for White's promise? Page 435.

5. Babcock agrees to subscribe for fifty shares of stock in a corporation to be formed. After the corporation is formed he refuses. To what extent is he liable to the corporation? Page 435.

6. The editorial writer of a newspaper company writes a libel which is printed. Is the corporation liable? Page 439.

7. The promoters of a railroad hire surveyors to lay out a prospective right of way. Have the surveyors an action against the corporation for their pay? Page 440.

8. A, B and C located a mine. Then they organized a corporation with a nominal capital of five million dollars. The corporation then bought the mine of A, B and C, giving each one-third of the stock marked "fully paid." The company fails. Have the creditors any action against A, B and C? Page 446.

## Insurance.

1. What is the doctrine of indemnity? To what forms of insurance is it applied? Page 448.

2. Jones takes out a life insurance policy with the Home Insurance Company. The policy is payable to Jones' wife. Mrs. Jones in order to secure a loan assigns the policy to Watkins. Who is the insurer? The insured? The beneficiary? The assignee? Page 449.

3. Whence is the right to be an insurer derived? Page 449.

4. A merchant having a policy of insurance on his stock of goods transferred the goods to Watkins who immediately thereafter sold them to the merchant's wife. The merchant then, with the consent of the insurance company, transferred the policy

to his wife. The goods are destroyed by fire. Can the wife recover on the policy? Page 450.

5. A ship owner takes out a marine insurance policy on his ship. He conceals the fact that the ship is leaky. The ship is destroyed by the surf after running aground in a fog. Can the owner recover on the policy? Page 451.

6. Is there a change of title where partners owning land form a corporation with only themselves as stockholders and then deed the property to the corporation? Page 454.

7. Is an insurance company bound to notify the insured of the premium day in order to give it the right to avoid the policy for non-payment of a premium? Page 456.

8. Insured is engaged in robbing a bank. He accidentally locks himself in a safe and is smothered to death. Can there be a recovery on an insurance policy on his life? Page 456.

**Trade Marks.**

1. Hill and May were partners manufacturing lead pencils. Hill one day sketched out a device that he said he thought would be good for a trade mark. They separated shortly after that and May at once began stamping the device on the pencils he made and using it as his trade mark and registered it as such. Is he entitled to it as against Hill? Page 458.

2. Which of the following devices could not be registered as trade marks: "Square crossed over compasses," as a trade mark for carpenters' tools; "Imperial" as a trade mark for chewing gum, it already being used as a trade mark for a kind of cloth; or when the word "Royal" is already used as a trade mark for gum; "Jones, Smith & Co.," for certain goods manufactured by that firm; the same words, only printed in a circle with the pictures of Jones and Smith in the middle; "Jonbro" for a new article manufactured by John Brown; "Pittsburgh" for steel made in that city; "Cape Cod Turkey" for canned codfish; "Never-tair" for clothing. Page 459.

3. How long may a trade mark registration be retained? Page 463.

4. Luce, having a duly registered trade mark, sold the same to Finch, though he still continued in the same business. What

are the rights of Finch with reference to the use of the trade mark? Page 463.

5. Hale had a duly registered trade mark on a certain kind of shoes. Todd was a small shoe manufacturer in Texas who sold no goods out of the state. He used the same device as Hale had registered. May Hale proceed against him for infringement of his trade mark? Page 464.

## Bankruptcy.

1. How is bankruptcy regulated in the United States? What effect has a Federal bankruptcy act upon state bankruptcy laws? Page 466.

2. What is the difference between a voluntary and an involuntary bankrupt? Page 468.

3. What is necessary before a natural person may be a voluntary bankrupt? Page 468.

4. An Arizona corporation owning a reservoir and irrigation ditches sells water to farmers. If its debts amount to $1,000 can it be made an involuntary bankrupt? Page 468.

5. What is meant by act of bankruptcy? When is an act of bankruptcy not necessary in order to permit a man to go into bankruptcy? Pages 469, 470.

6. Jones has debts amounting to $5,000. With the exception of $7,000 in the bank, he has no property. He draws out this money and secretly purchases a piece of real estate from Heckman. He has the deed made out as if the land were conveyed by Heckman to Loring and has this deed recorded. By a secret agreement between Jones and Loring, Jones is to get all the rents and profits from the land. Has Jones committed an act of bankruptcy? Pages 470, 473.

7. When is it an act of bankruptcy for a debtor to give away property? Page 474.

8. How may creditors force a debtor to commit an act of bankruptcy? Page 476.

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